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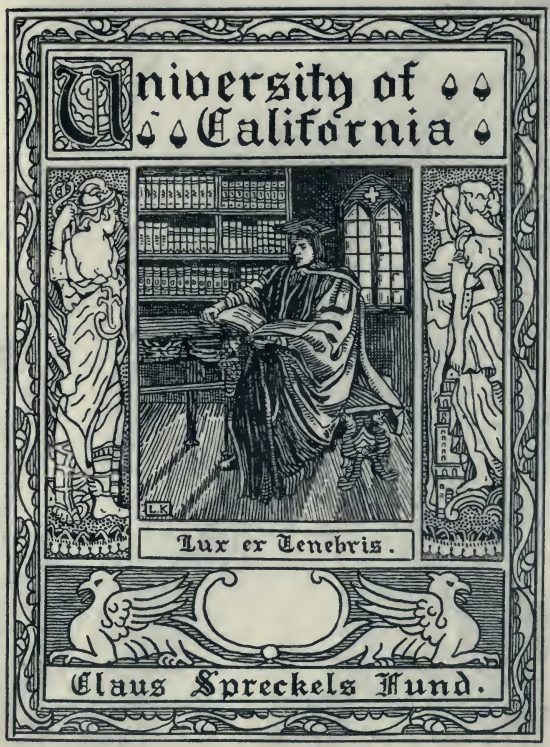
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MARINE INSURANCE:

ITS PRINCIPLES AND PRACTICE.

BY

FREDERICK TEMPLEMAN,

of the Alliance Marine and General Assurance Company, Ltd., and
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SPRECKELS

PREFACE.

In a few prefatory words I desire to express my sense of the honour conferred upon me by the London Chamber of Commerce in inviting me to give a series of five lectures on the subject of "Marine Insurance: its principles and practice," in connection with their scheme for promoting Higher Commercial Education. This invitation I accepted with mingled gratification and diffidence—with gratification on account of the honour to which I have referred, but with diffidence owing to my doubt as to my qualifications for such an undertaking, especially after the able and lucid Introductory Lecture. The large number of listeners who attentively followed this course of lectures was ample proof that the object did not lack appreciation, and decided the Council of the Chamber of Commerce to do me the further honour to publish the lectures in handbook form.

To obtain a practical understanding of the subject of Marine Insurance, it necessary to have an accurate knowledge of the scope of the contract, and of the meaning of its terms; of the manner in which claims arise under it, and how those claims are in practice dealt with. And these were the objects of my lectures, now reduced to the form of this small elementary treatise. Space has not enabled me to discuss every point, nor to deal exhaustively with all the points discussed. I have, however, where space permitted, given a short outline of some of the leading legal decisions which elucidate the important points with which they severally deal.

In order to guard against any possible misapprehension, I think it well to observe that this handbook is written by me in my personal private capacity, and must not be regarded as expressing an opinion or view of the Association of Average Adjusters, of which Association I have the privilege to be the Secretary.

To Mr. Douglas Owen for his valuable suggestions during the preparation of my lectures, and to Mr. William Richards for his kindness in having carefully gone through the proof-sheets of this handbook, I desire to express my grateful thanks.

1st June, 1903. F.T.

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COPY OF LLOYD'S FORM OF POLICY.

Be it known that

as well in own Name, as for and in the Name and Names of all and every other Person or Persons to whom the same doth, may, or shall appertain, in part or in all, doth make assurance and cause and them and every of them to be insured, lost or not lost, at and from

S.G.

£

upon any kind of Goods and Merchandises, and also upon the Body, Tackle, Apparel, Ordnance, Munition, Artillery, Boat and other Furniture, of and in the good Ship or Vessel called the

whereof is Master, under God, for this present voyage,

or whosoever else shall go for Master in the said Ship, or by whatsoever other Name or Names the same Ship, or the Master thereof, is or shall be named or called, beginning the adventure upon the said Goods and Merchandises from the loading thereof aboard the said Ship

upon the said Ship, &c.,

and shall so continue and endure during her Abode there, upon the said Ship, &c.; and further, until the said Ship, with all her Ordnance, Tackle, Apparel, &c., and Goods and Merchandises whatsoever shall be arrived at

upon the said Ship, &c., until she hath moored at Anchor Twenty-four Hours in good Safety, and upon the Goods and Merchandises until the same be there discharged and safely landed; and it shall be lawful for the said Ship, &c., in this Voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever

without Prejudice to this Insurance. The said Ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured by Agreement between the Assured and Assurers in this Policy, are and shall be valued at

Touching the Adventures and Perils which we the Assurers are contented to bear and do take upon us in this Voyage, they are, of the Seas, Men-of-War, Fire, Enemies, Pirates, Rovers, Thieves, Jettisons, Letters of Mart and Countermart, Surprisals, Takings at Sea, Arrests, Restraints, and Detainments of all Kings, Princes, and People, of what Nation, Condition, or Quality soever, Barratry of the Master and Mariners, and of all other Perils, Losses,

and Misfortunes that have or shall come to the Hurt, Detriment or Damage of the said Goods and Merchandises and Ship, &c., or any part thereof; and in case of any Loss or Misfortune, it shall be lawful to the Assured, their Factors, Servants and Assigns, to sue, labour, and travel for, in, and about the Defence, Safeguard and Recovery of the said Goods and Merchandises and Ship, &c., or any part thereof, without Prejudice to this Insurance; to the Charges whereof we, the Assurers, will contribute, each one according to the Rate and Quantity of his sum herein assured. And it is especially declared and agreed that no acts of the Insurer or Insured in recovering, saving, or preserving the property insured, shall be considered as a waiver or acceptance of abandonment. And it is agreed by us, the Insurers, that this Writing or Policy of Assurance shall be of as much Force and Effect as the surest Writing or Policy of Assurance heretofore made in Lombard Street, or in the Royal Exchange, or elsewhere in London.

Warranted nevertheless free of capture, seizure and detention, and the consequences thereof, or of any attempt thereat, piracy excepted, and also from all consequences of hostilities or warlike operations, whether before or after declaration of war.

And so we the Assurers are contented, and do hereby promise and bind ourselves, each one for his own part, our Heirs, Executors, and Goods, to the Assured, their Executors, Administrators, and Assigns, for the true Performance of the Premises, confessing ourselves paid the Consideration due unto us for this Assurance by the Assured

at and after the Rate of

IN WITNESS whereof, we the Assurers have subscribed our Names and Sums assured in

N.B.—Corn, Fish, Salt, Fruit, Flour, and Seed are warranted free from Average, unless general, or the Ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides, and Skins are warranted free from Average under Five Pounds per Cent.; and all other Goods, also the Ship and Freight, are warranted free from Average under Three Pounds per Cent., unless general, or the Ship be stranded.

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MARINE INSURANCE:

ITS PRINCIPLES AND PRACTICE.

CHAPTER I.

THE CONTRACT OF MARINE INSURANCE.

The Contract of Marine Insurance is a Contract of Indemnity. Whereas in the case of Fire Insurance the indemnity is, speaking generally, regarded as limited to the actual loss sustained, in Marine Insurance it is ordinarily based on values agreed in advance, which values may be greater or less than the values actually at risk. In consideration of the payment of a certain sum called the "Premium" the underwriters agree to indemnify the assured against loss or damage caused by certain specified perils, sometimes called perils of the sea, but which would be more accurately described as "perils insured against," inasmuch as some of the risks insured against are not sea risks at all.

The document embodying the contract of insurance is called the "Policy," and it has been described as "a contract of indemnity against all losses accruing to the subject matter of the policy from certain perils during the adventure." (Lord Blackburn in *Lloyd v. Fleming*, 1871, I. Asp., M.L.C., 193).

Marine Policies, though commonly in one form, are of different kinds, and are known by different names, according to the manner in which they are executed, or the risks which they are intended to cover. It is necessary, therefore, to give a brief explanation of the meaning of the various descriptions applied to marine policies.

An "Interest" Policy is one which shews clearly that the assured has a specific, real, and substantial interest at risk, as, for example, an insurance on 50 bales wool, 1,000 bags rice or 100 chests tea.

A "Voyage" Policy, in contradistinction to a "time" policy, is one in which the limits of the risk are defined by termini or places, the subject matter of the insurance being insured for a particular voyage: as, for example, London to Bombay, or New York to Liverpool.

A "Time" Policy is one which expresses the insurance of the subject for a specified period of time, as for example, from noon 1st January, 1903, to noon 1st January, 1904. This kind of insurance is generally resorted to in the case of hulls, etc., of vessels, though in some cases shipowners prefer to insure their vessels for each separate voyage, under a "voyage" policy.

A "Valued" Policy is one where an agreed value (not necessarily the actual value) of the thing insured is inserted in the policy: as on goods valued at £1,000, or on hull valued at £10,000.

An "Open" or "Unvalued" Policy is, to be exact, one in which the value of the subject matter of the insurance is not stated, but left to be ascertained and proved. This form of policy is, however, not frequently met with. But the term "open" policy is now generally applied to what is, strictly speaking,

A "Floating" Policy. An "open" or "Floating" policy is one in which no name of any special vessel is inserted, it being stated to attach to any "*Ship* or *Ships*" or "*Steamer* or *Steamers*," to be declared for a certain specified voyage. The names of the vessels and details of the interest attaching to them are subsequently declared by endorsement on the policy, and are termed "declarations," these being initialled by the underwriter to show that they have been noted and approved. It is also to be well borne in mind that in the case of all "open" or "Floating" policies, it is a fundamental principle and under-

standing that all shipments which would attach are to be declared thereunder by the assured. He must not declare some, and run his own risk upon or insure others elsewhere, any more than he can wait and see what vessels arrive with a view to declaring only those vessels which are lost, or shipments that have arrived damaged. And in the event of loss before declaration, the amount to be declared must be computed in accordance with the provisions of the policy, or in exactly the same manner as that in which the values of previous declarations have been arrived at.

Lastly, a "Wager" Policy is one which bears evidence on the face of it either that the assured has no strictly insurable interest at stake, or else that the underwriter is willing to dispense with any proof of such interest. Such words as "Policy proof of Interest" (the initials of which give the key to the familiar "P. P. I." policies) or "Interest or no Interest" or other expression words to like effect, being inserted in the policy. All such insurances are void according to statute (19 Geo. II C. 37, 8 & 9 Vict. C. 109, § 18). Although valueless in a court of law they nevertheless continue to be executed, and inasmuch as there is no legal obligation on the underwriter to be bound by the policy, and as it would be open to him, if he so willed, to repudiate the contract altogether, such policies probably inspire on the part of underwriters more than ordinary respect. They are regarded as a record of an obligation not of law but of honour between the parties, and are therefore termed "Honour" policies.

GOOD FAITH. CONCEALMENT.

The essential feature of a Contract of Marine Insurance, as of every other contract, is good faith. Fraud invalidates the insurance, and deprives the party committing it of all his rights arising out of the contract. The relations existing between an assurer and his underwriter are such that a full disclosure of all the facts concerning the risk must be made. Such details as do not affect the risk need not, of course, be communicated, nor

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such information as an ordinary underwriter is presumed to possess in the usual course of his business. But any circumstance which is within the knowledge of the assurer and likely to influence the underwriter as to the desirability of accepting or declining the risk, or of arriving at the amount of premium which he will charge for accepting it, must be fully divulged. Such circumstances are known as "material facts." Should there be any concealment the insurance is void.

MISREPRESENTATION.

Misrepresentation is equally fatal to the contract. If it should happen, however, that the policy has been avoided by misrepresentation not amounting to moral fraud, the assured will be entitled to a return of the premium: but no such return of premium would be made if it transpired that such misrepresentation had been made with a view to deceive.

IMPLIED WARRANTIES.

There are certain essential conditions, or so-called "warranties," which must be complied with in order to render a Contract of Marine Insurance valid. They are not expressed (they go without saying), but they are tacitly understood, and are called "Implied Warranties." They are most important, as non-compliance with any one of them is also fatal to the contract.

These implied warranties are three in number, and their purport may be expressed as follows, viz.:—

i. In every voyage policy, that the vessel shall be seaworthy when the risk commences: or if the voyage be divisible into distinct stages, at the commencement of each stage.

ii. That the voyage shall be prosecuted in the usual way without undue delay, deviation or departure from any of the established usages of trade or navigation.

iii. That the adventure shall in all respects be a legal one, and the ship properly documented.

Now let us proceed to consider these implied warranties *seriatim*.

SEAWORTHINESS.

In every "voyage" policy there is an implied warranty that at the commencement of the voyage the vessel shall be seaworthy, *i.e.*, reasonably fit in all respects to encounter the ordinary perils of the seas of the adventure insured, and also reasonably fit to carry the particular cargo contracted to be carried. This warranty applies to policies on goods and on hull for a "voyage," but there is no implied warranty of seaworthiness in an ordinary "Time" policy on ship, the reason for this being that it often happens that when a "time" policy first attaches the vessel is at sea, and consequently the owner is not in a position to guarantee her condition. In the case of a "time" policy, however, if *with the privity of the assured* the vessel is sent to sea in an unseaworthy state and she is lost in consequence, such a loss would not be recoverable from the underwriter, in spite of the fact that the direct cause of the loss was a peril insured against. (*Thompson v. Hopper* (1856), 1 E.B. & E., 1033). *A fortiori*, a loss directly attributable to unseaworthiness would not be recoverable. (*Fawcus v. Sarsfield* (1856), 6 E. & B., 192.)

In the case of insurances on the hull, etc., of a vessel or on goods for "voyage," the warranty of seaworthiness must be literally complied with, although in practice it is not rigidly enforced in the case of goods where an innocent shipper has sustained loss through no fault of his own. Strictly speaking, neither ignorance nor innocence will absolve the assured from the consequences of a breach of the warranty. In the case of insurance on ship, the shipowner may, in fact, have done everything within his power to ensure that his vessel is in every way fit for the voyage, and yet some latent defect, which every care would fail to discover, would, in the absence of any special stipulation in the policy, defeat his object, and render recovery for a loss impossible. An instance of this was provided in the case of the *Quebec Marine Insurance Co.* v. *Commercial Bank of Canada*.

(1870, L.R., 3 P.C., 234.) In that case a ship had been insured for the voyage from Montreal to Halifax, N.S. When she sailed there was an undiscovered defect in her boiler, which became visible on the passage down the River St. Lawrence. The defect subsequently became so serious as to disable her, and necessitated her returning to Montreal for repair. After the necessary repairs had been effected the vessel resumed her voyage, and she was subsequently lost in bad weather. In these circumstances it was held that the vessel was unseaworthy when she originally started on the voyage, and that consequently the underwriters were not liable.

And not only must the state of the hull of the vessel herself comply with the requirements of seaworthiness; she must not be overloaded, and, moreover, her cargo must be properly stowed. She must also not be undermanned, and her officers and crew must be efficient.

In a "voyage" policy on ship, the warranty of seaworthiness applies to the condition of the vessel at the commencement of the adventure, and she must also be seaworthy for any distinct stage of the voyage.

But it often happens that the voyage insured may be capable of division into distinct stages, and where that is so, the warranty of seaworthiness must be complied with at the commencement of each separate stage.

Let me here mention two decisions of our Courts which will, I think, make my meaning clear on this point.

The first case to which I would refer is that of *Bouillon v. Lupton* (1863, 33 L.J.C.P. 37). Three steamers which were trading on the River Rhone had been sold for service on the Danube, and were insured for the voyage from Lyons to Galatz. In order that these vessels could pass under the numerous low bridges which span the Rhone, it was necessary that they should leave Lyons without masts, and in this condition they descended the river as far as Marseilles. On arrival at the latter port, they were fitted with masts and generally prepared for the

voyage to Galatz. When the vessels entered the Black Sea a storm arose, and they all foundered. The underwriter declined to pay, on the ground that when the vessels left Lyons they were not in a state of seaworthiness for the *whole* voyage. But the Court decided that the warranty had been complied with if different degrees of seaworthiness were necessary for the different stages of the voyage, and if at the commencement of each stage the vessels were properly equipped. And it was held that these requirements had been fulfilled in this case, and that the underwriter was liable. As was observed by Mr. Justice Wills:—"In descending the Rhone a vessel must be seaworthy (if I may use the term) for the Rhone; and from Marseilles to Galatz she must be ready for the sea."

In the foregoing case the stages of the voyage in relation to the warranty of seaworthiness required different equipment, one state being sufficient for the river voyage, and another and superior state being necessary for the sea voyage. But it does not follow that each separate stage need necessarily be endowed with a difference of conditions. We have now huge vessels carrying thousands of tons of cargo on voyages, let us say, to the Antipodes, and it is an impossibility from a commercial point of view for a vessel to take on board at the commencement of the voyage a sufficient coal supply for the whole voyage. It has therefore become customary to coal at intermediate ports. *Prima facie* a vessel must be provided, when she sails, with sufficient coal for the whole voyage in order to satisfy the warranty of seaworthiness. But the difficulty arising out of so strict a compliance with the warranty has been solved by two decisions of the Court of Appeal (*Thin v. Richards* (1892) VII. Asp. M L.C. 165, and the "*Vortigern*" (1899) IV. Com. Cas. 152, VIII. Asp M.L.C. 523), both cases arising out of contracts of affreightment, *i.e.*, disputes between shippers and shipowners, and not marine insurance policies. These decisions have established the rule that where a steamship starts on a voyage which is of such a length and duration that she can only take on

board at the commencement sufficient coal for a section or portion of the voyage, and it is the intention to take on board a further supply in place of that consumed at one or more intermediate ports, such voyage must be considered as being divided into stages for coaling purposes, and the warranty of seaworthiness attaches on the sailing of the vessel from each coaling port for the stage which ends at the next coaling port.

Of the two decisions of the Court of Appeal just mentioned, the one to which I would refer is that of the "*Vortigern*," because, although it arose, as I have said, out of a contract of affreightment, the late Lord Justice Smith expressly said that the decision was equally applicable to contracts of marine insurance. The vessel was on a voyage from Cebu (Phillipine Islands) to Liverpool. This voyage was, for coaling purposes, divided into three stages: from Cebu to Colombo; from Colombo to Suez; and from Suez to Liverpool. Owing to the negligence of the engineer, the vessel sailed from Colombo for Suez, which constituted the second stage of her voyage, with an insufficient supply of coal for that stage. The result was that before she reached Suez she ran short of fuel, loss being consequently incurred by putting cargo into the furnaces as a substitute for coal. It was held by the Court that the vessel was unseaworthy, inasmuch as she had started on the second stage of her voyage (Colombo to Suez) with an insufficient quantity of coal to complete that stage.

In the case of an insurance on goods, there is no implied warranty of seaworthiness so far as the goods themselves are concerned; but an underwriter cannot be held responsible for loss or damage which has occurred to them owing to their *inherent vice*, or, as it is more generally called, *vice-propre*. For example, the spontaneous heating of copra, *i.e.*, dried cocoa-nut. (*Koebel v. Saunders* (1864), 33 L.J., C.P. 310).

The implied warranty of seaworthiness which requires such strict fulfilment as regards the ship does not extend to lighters

employed, for example, to take cargo ashore, where the policy includes "risk of craft to and from the ship." (*Lane v. Nixon* (1866). L.R., 1 C.P. 412).

DEVIATION.

The second implied warranty is that there shall be no deviation. The consequences entailed by a deviation are set forth in the Marine Insurance Bill (sec. 47) as follows, viz. :—

> "Where a ship, without lawful excuse or justification, deviates from the voyage contemplated by the policy, the insurer may avoid the contract as from the time of deviation, and it is immaterial that the ship may have regained her route before any loss occurs."

Lowndes, in his work "The Law of Marine Insurance," (II. Ed. p. 91), gives the following examples of deviation, viz. :—

> i. Going to a port not named in the policy, not clearly justified by custom nor falling within the range of any more general terms.
>
> ii. Visiting ports where several are named, in an order different to that which the policy has defined.
>
> iii. Where the insurance is to a district comprising several ports, taking them in an order other than customary, or, if there be no custom, other than in their natural order.
>
> iv. Staying to trade where the language of the policy implies no such liberty.
>
> v. Calling at places, though within some general liberty given, for purposes which are not within the scope of the voyage.
>
> vi. Improper delay in not prosecuting the voyage with reasonable despatch.

It is immaterial if there is only an *intention* to deviate. There must be a deviation *in fact* to discharge the underwriter from liability under his policy.

With regard to voluntary delay, it has been decided that it does not matter whether the risk has or has not been thereby

increased. The only question is whether the risk has been varied. Let me give an extreme example of delay which would void an insurance. Suppose a vessel was insured for a voyage across the Atlantic, and the time when the insurance was effected, was, let us say June, leading the underwriter to think that a summer voyage was intended. And suppose there was such unreasonable delay in commencing the voyage that it was postponed until winter. Such a delay would, needless to say, avoid the policy.

But although an insurance may be avoidable in consequence of deviation, there may have been a deviation which is justifiable, in which case the insurance stands good. I propose, therefore, to explain the circumstances, or, rather, the essential conditions which must be present in order to justify a deviation, and in order to do so I will again quote the Marine Insurance Bill so far as regards justifications for deviation. These justifications are six in number.

Section 50 of the Bill provides:—

Deviation or delay in prosecuting the voyage contemplated by the policy is excused:—

i. *Where the deviation is authorised by any special term in the policy.*

The proposition contained in this provision is self-evident, as it naturally follows that if the deviation is "*authorised*" by the terms of the policy, a deviation would not render it void. It may here be mentioned that such authorisation or permission to deviate is ordinarily incorporated into the policy by the attachment of a clause called the

DEVIATION AND/OR CHANGE OF VOYAGE CLAUSE.

This clause assumes a variety of forms, the simplest of which is perhaps the following, viz:—

"*In the event of deviation and/or change of voyage, the assured to be held covered at a premium to be arranged, provided due notice be given on receipt of advices.*"

By the insertion of this clause explicit permission is given to deviate or to change the destination of the vessel. It must be shewn, however, that the vessel actually sailed from the starting point stipulated in and on the voyage covered by the policy, otherwise the terms of the clause do not apply. If the vessel sailed on a voyage different from that insured, the policy would not attach, and if the contract itself did not attach, a clause forming part of the contract could not have any effect. This proposition is based on the case of *Simon Israel and Co. v. Sedgwick* (1892, VII. Asp. M.L.C., 245), a decision of the Court of Appeal in 1892. The policy was stated to be "at and from the Mersey and/or London, both or either, to any port or ports in Portugal, and/or Spain this side of Gibraltar, and/or at and from thence by any inland conveyances to any place or places in the interior." It also included a clause providing that deviation or change of voyage should be held covered at a premium to be arranged. Goods, the property of the assured, were dispatched from Bradford and destined to Madrid, and the intention was that the said goods should be shipped at Liverpool for Seville, to be thence forwarded by land to Madrid. This was the route, or rather method of forwarding goods to Madrid which had been uniformly followed in previous cases by the shippers, and they accordingly instructed their insurance brokers that the voyage was to Seville, and the insurance was put forward accordingly. The goods were shipped by the "Lope de Vega" and it became apparent on an inspection of the bills of lading that the voyage on which the vessel had sailed was not to Seville at all, but to Carthagena, a port on the east coast of Spain, whence the goods could likewise be sent forward to Madrid by rail. The vessel was lost, the loss happening on that part of the voyage which was common to vessels going either to the western or eastern ports of Spain. The shippers, in view of the clause in the policy providing that deviation and/or change of voyage should be held covered at a premium to be arranged, offered to pay an additional premium to cover the

goods to Carthagena, but this the underwriters refused to accept. The shippers thereupon sued the underwriters to recover the loss in question. The Court, however, decided against them, holding that there had not been a mere intention to deviate, but that inasmuch as the vessel actually sailed on a different voyage and one which was not covered by the policy, the policy had never attached to the goods in question, and that, therefore, the "deviation and/or change of voyage" clause contained in the policy could have no force or effect. In other words, as the contract itself did not apply, *a fortiori* none of the terms of it could apply.

The second justification given for deviation is:—

ii. *Where the deviation has been caused by circumstances beyond the control of the master and his employer.*

Deviation caused by the violence of the elements is, of course, excusable, as in the case of a vessel blown out of her course by violent gales (*Delaney v. Stoddart*, 1 T. R. 22). But there may be instances of deviation caused by circumstances beyond the control of the master and his employers which are not attributable to the action of the elements. For instance, a crew, fearing the attacks of pirates if they continued on the voyage, all left the ship and refused to go back unless the master promised to forthwith return to his home port. The captain promised and returned, and his so returning was in these circumstances held to be no deviation. (*Driscol v. Bovil*, 1 B. & P. 313).

The third excuse is:—

iii. *Where the deviation is necessary in order to comply with an express or implied warranty.*

The case of *Bouillon v. Lupton* (1863, 33, L.J.C.P., 37) referred to in connection with the implied warranty of "seaworthiness," provides an illustration of the purport of this justification. The case will doubtless be remembered—the steamers coming down the River Rhone without masts on account of the bridges, fitting out at Marseilles for the sea, and being subsequently lost. The delay at Marseilles in order to make these vessels seaworthy

constituted a deviation, but it was a deviation which was justifiable.

The fourth justification is:—

iv. *Where the deviation is reasonably necessary for the safety of the ship or subject-matter insured.*

This excuse seems hardly to need any explanation. It simply provides that where, having regard to the risks covered by the policy, the deviation is necessary for the safety of the thing insured, it is justifiable. A vessel, for example, may meet with violent weather and be so damaged as to necessitate putting into a port of refuge for repair. Deviation for such a purpose is justifiable. Or a vessel, properly equipped and manned at the commencement of the voyage, may run short of provisions, or a large proportion of her officers or crew may have become incapacitated or died from sickness or other causes; and putting into port to obtain further provisions or to procure fresh officers or hands is excusable.

The fifth exception which justifies deviation is—

v. *When the deviation is made for the purpose of saving human life or aiding a ship in distress where human life may be in danger. Or where reasonably necessary for the purpose of obtaining medical or surgical aid for any person on board the ship.*

This exception is one which is justified on the grounds of humanity, and it would be strange indeed if a deviation were not allowable for such a purpose. But it must be carefully noted that the liberty to deviate is only for the purpose of saving life, and does not extend to cover a departure from the voyage in order solely to save property. If a salvage service rendered to a ship and cargo is of such a nature as not to be reasonably necessary for the saving of the lives of those on board, the deviation is unjustifiable (*Scaramanga v. Stamp* (1880), 5 C.P.D. 295).

The sixth and last exception is—

vi. *Where the deviation has been caused by the barratrous conduct of the master or crew, if barratry be one of the perils insured against.*

The meaning of "barratry" will be dealt with when considering the wording of the policy. Suffice it to say for present purposes that "barratry" is any act committed with criminal intent by the master or crew of a vessel in violation of their duty to the shipowner, and without his connivance (McArthur, Contract of Marine Insurance, II. Ed. p. 130). And if deviation is due to such an act, then it is excused.

Finally there is the proviso:—

When the cause excusing or justifying the deviation or delay ceases to operate, the ship must resume her course or prosecute her voyage with reasonable despatch.

In other words, after a justifiable deviation there must be no waste of time in resuming the voyage, and no departure from the ordinary course of doing so; otherwise deviation again occurs, annulling the contract.

LEGALITY.

We will now proceed to notice the third and last implied warranty, viz., that the adventure shall be legal. No policy is valid if it has been effected with a view to cover a trade or voyage which is prohibited by the law of this country, or which is contrary to public policy. An insurance to cover the risk of smuggling, for example, which, if detected, would involve the confiscation of the property by our revenue laws, is void. But should the adventure insured be a legal one, and the master and crew, unknown to the owner, indulge in smuggling on their own account, this would not avoid the policy, as it would be a case of barratry.

CHAPTER II.

THE POLICY, AND ITS PHRASEOLOGY.

Before proceeding to consider the phraseology of the policy in detail it may be well if we glance at the document as a whole. It is true that it is an antiquated document, and we can hardly expect, therefore, to find that it exactly fits in with the requirements of the commerce of the present day. Our Judges have on occasions been particularly uncomplimentary towards this venerable instrument. It has been designated "absurd and incoherent," "a very strange instrument," "drawn with much laxity," and it has been described as "hardly intelligible." The antiquity of the policy-form was touched upon by Mr. Douglas Owen in his Introductory Lecture, and he then likened the words of that document to hat-pegs waiting to be capped by legal decisions, a process which in course of time has resulted in our having before us caps—very many of them—upon the pegs. These legal caps are not to be lightly cast away, and in considering the advisability of abolishing or amending the venerable form of policy it must not be forgotten that its phraseology and terms have been so subjected to legal decisions, that the meaning which our Courts attach to almost every word is common knowledge. The adoption of a new form of policy would therefore not unlikely provide a fresh row of hat-pegs to await in turn legal decisions to cap them. For this reason it seems to me preferable to keep to our old friend the ancient form, to

". . . Rather bear those ills we have
Than fly to others that we know not of."

It is true that the antiquated form of policy has to do service for insurances of every kind—Hulls, etc., for time or voyage, Goods, Freight, Profits, and even Bonds perhaps from London to Manchester by registered post, an adaptation by the way

scornfully referred to by the late Lord Esher, M.R., in the case of *Baring v. The Marine Insurance Co.* (1894, 10, T.L.R. 276) as an "acrobatic performance." If its terms do not exactly express the requirements of the parties, this fault is remedied by writing in conditions, or by sticking on clauses to give effect to their wishes. Some Companies have now adopted a separate form of policy for use in the insurance of hulls of vessels as opposed to goods, and I have no doubt that this will sooner or later meet with general adoption.

At one time it was doubted whether a marine policy would cover land risks while the property insured was on land, or whether it was only applicable to property whilst it was afloat; but it has been decided "that when either by a known or by an agreed usage, or by the terms of the policy, land is made part of the voyage, the risk covered applies to that part as well as the other." (*Elliott v. Rodocanachi* 1874, II. Asp. M.L.C. 21, 399.)

A policy, in order to be valid, must be duly stamped. For voyage policies and for time policies for a period not exceeding six months, the duty is 3d. for each £100 assured, or fractional part thereof. For a time policy for a period exceeding six months but not exceeding twelve months, the duty is 6d. for each £100 assured or fractional part thereof. If the policy on hull, etc., is for a voyage and for a period of only thirty days after arrival at destination, it is only chargeable with duty as a voyage policy. But if the period exceeds thirty days, the policy must be stamped with double duty—as a policy for voyage and a policy for time. Consequently, if thirty days are covered in addition to the "twenty-four hours" mentioned in the policy, this, being a period of thirty-one days, would involve double duty. It is, therefore, usual to delete the words "twenty-four hours" if the vessel be also covered for thirty days after arrival. Some years ago it was recognised that such a rate of duty bore hardly in cases where the premium was small, and it was enacted that where the premium charged is 2s. 6d. per centum or less, the duty should be 1d. only, without regard to the amount insured.

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No policy may be made for a period exceeding twelve months, and every policy so made is null and void. Policies issued abroad and made payable in the United Kingdom are by law required to have a Government stamp affixed to them within ten days after their first receipt in the United Kingdom.

CONSTRUCTION.

The question naturally arises, What rules of construction are to be applied to the policy? An answer to that question can be found in the words of Lord Ellenborough in the case of *Robertson v. French* (1803, 4 East. 130):—"The same rule of construction which applies to other instruments applies equally to this, namely, that it is to be construed according to the sense and meaning as collected, in the first place, from the terms used in it, which terms are to be understood in their *plain, ordinary, and popular sense* unless they have generally in respect to the subject matter, as by known usage of trade or the like, acquired a peculiar sense, distinct from the popular sense of the same words, or unless the context evidently points out that they must, in the particular instance, and in order to effectuate the immediate intention of the parties, be understood in some other special and peculiar sense."

In the event of there being any reasonable doubt as to the construction of the policy, evidence may be given as to any existing usage or custom which may throw light on the real intention of the parties to the contract. But evidence of custom or usage can only be admitted when the meaning of the contract is doubtful. In the words of Lord Lyndhurst:—"Usage is only admissible to explain what is doubtful, never to contradict what is plain." (*Blackett v. Royal Exchange Assurance Corporation*, 3 C. & J. p.p. 244).

In the event of there being any reasonable doubt as to the constitution of the policy, it must be construed against the grantor of the contract—the underwriter—that being the rule

of English law applying to written contracts generally. It must also be borne in mind that anything written on the face of the policy, or any printed clause attached thereto, overrides any printed matter to which such writing may be opposed.

ASSIGNMENT.

The policy is a document which is capable of assignment by the person in whose name the insurance has been effected to another person who may be interested therein, the assignment usually being merely by means of endorsement and delivery. If, however, a ship is sold whilst at sea, an insurance on her hull, etc., effected by the vendor ceases to cover her unless the insurance is transferred to the purchaser as part of the transaction of sale, or for a separate price to be paid in consideration of the transfer of the policy. And the same remarks equally apply to policies on goods.

THE PHRASEOLOGY OF THE POLICY.

Having considered the Contract of Marine Insurance as a whole, and the Implied Warranties with which compliance is necessary, let us now proceed to examine the contract in detail.

The opening words of the policy are—

Be it known that . . . . .

after which is a space for the name of the person who is either the actual assured or his agent. The insertion of some name in this space is absolutely necessary, as policies "in blank" are void at law (28 Geo. III , c. 56), and this Act further stipulates that the name which is filled in must be that of some person interested in, or who has authority to effect the insurance. And this leads us to the initial question

WHO MAY INSURE? INSURABLE INTEREST.

The person who effects an insurance, or gives instructions for it to be effected, must have what is termed an "Insurable Interest." He must "be so situated with regard to the thing "insured that he would have benefit from its existence, prejudice

"by its destruction." (Lawrence J. in *Lucena v. Crawfurd*, 1 Taunt 325).

It must not be inferred that it is only the owner of property, either entirely or in part, who has a right to insure. Shippers, agents and so forth have an insurable interest in property in respect of which they are in a position to exercise a valid lien for money advanced; a mortgagee on ship has an insurable interest to the extent of his mortgage; a trustee or bailee as regards property entrusted to his care; agents or brokers having authority from their principals to insure; and, I need hardly add, an underwriter in respect of risks which have been underwritten by him and which he may himself wish to re-insure.

All persons irrespective of nationality have the right by English law to protect their property by an English insurance, with one exception, viz.:—Alien enemies, *i.e.*, subjects of a foreign state at war with this country. The reason for this is that it would be impolitic to allow subjects of the Crown to indemnify an enemy for losses inflicted on his commerce. And any insurance so effected would be null and void.

> "*As well as in his or their own name as for and in the name and names of all and every other person or persons to whom the same doth may or shall appertain, in part or in all, doth make assurance and cause himself or themselves and them and every of them to be insured.*"

The meaning of this top-heavy sentence is that any person who, during the currency of the risk, may have, or may acquire an insurable interest in either a part or in the whole of the subject matter of the insurance, may elect to avail himself of the protection of the policy by subsequent adoption, although the policy is made out in the name of some other person. Moreover, it is not necessary that the adoption of the policy should be made before the happening of the loss.

Perhaps it will make my meaning clearer if I give an instance of adoption of a policy which actually occurred. A

London insurance broker effected, by the instructions of one Hagedorn, an insurance for the benefit of a foreign merchant named Schrœder. The latter, however, had given Hagedorn no instructions to insure. A loss occurred, and some two years after its happening the foreign merchant, Schrœder, wrote to Hagedorn "hoping" that the loss had been paid by the underwriters on the policy in question. This adoption by Schrœder was held to be equivalent to a previous authority to insure. (*Hagedorn v. Oliverson*, 1874, 2 M. and Sel. 485). The case is an old one, and the business methods of to-day hardly enable us to realise a merchant complacently waiting two long years before taking any measures to ascertain what was his position with regard to recovering the loss. But I have selected this case as being an extreme one, and best calculated to illustrate my remarks.

"*Lost or not lost.*"

The meaning of these words is plain, but their effect is not so wide as it may seem at first sight. Their effect, though limited, is certainly retrospective, but, as we shall see, their applicability to the contract is subject to certain conditions when the contract was effected. It often happens that a merchant may have his goods exposed to the dangers of the seas before he has news of their shipment, or an opportunity of protecting them by insurance. Of course the assurer, when effecting the insurance, must be without information that a loss had occurred. If the assurer did know of the happening of a loss and the underwriter did not, it would be a concealment and a breach of good faith which, as we have already seen, would render the insurance null and void. Or take the converse case of the merchant effecting an insurance when the underwriter knew all the time that the vessel had safely arrived, though the merchant was ignorant of the fact. In such a case the underwriter would have to return the premium, or an action at law would succeed against him if he did not do so. These remarks do not, of course, apply to

declarations under "Open" or "Floating" policies. Where, however, in the case of an ordinary policy neither underwriter nor assured have knowledge of a loss having happened, the assured will be entitled to recover for a loss which had actually happened before the contract was entered into. And this is the limit of the retrospective meaning to be attached to the words "lost or not lost."

"*At and from.*"

These words precede the blank space left for the insertion of a description of the voyage insured, and it must be noted that there is a very material distinction to be drawn between an insurance "*from*" and an insurance "*at and from*" a port. A policy covering the risk "from" a port only protects the subject matter of the insurance from the time of sailing from the port. For example, an insurance from London to New York only attaches from the moment when the vessel sails from London on her voyage. But an insurance "at and from" a port has a far wider meaning. It protects the subject matter of the insurance whilst *at* the port of departure previous to her departure, and also from the time of leaving it, and on her voyage.

If a vessel at her home port is insured "at and from" that port, the insurance attaches immediately it is effected, and continues to protect her whilst she is making the necessary preparations for the voyage. (*Palmer v. Marshall*, 1831, 8 Bing. 79).

If a vessel be insured "at and from" a port which she has not then reached, the insurance commences immediately on the vessel's arrival at that port, always provided, however, that she shall have arrived there in such a condition that she can reasonably be expected to lie there in safety until any repairs, if repairs are necessary, have been effected. Should the vessel arrive at the port so seriously damaged that she cannot lie there in safety until repaired, the policy does not attach. It does not

follow that she shall have arrived at the port undamaged; but if the damage is only of such a nature as not in any way to interfere with her safety whilst in port, then the policy attaches from the moment of her entering within the limits of the port.

An important case bearing on the meaning of the words "at and from" a port abroad is that of *Haughton v. The Empire Marine Insurance Co.* (1866, L.R. 1 Ex. 206). An insurance was effected on the hull of a vessel "at and from" Havana to Greenock. The vessel arrived off Havana, and on entering the limits of the port engaged a pilot and tug to take her to an anchorage. She was, however, taken to an anchorage where she subsequently settled down upon the anchor of another vessel, doing serious injury to herself. On the following day she was towed off and taken to another part of the harbour where her cargo was eventually discharged. The underwriters on the policy "at and from" Havana declined to pay for the repair of the damage occasioned by the settling down upon the anchor, contending that when the accident happened the vessel was not *at* Havana within the meaning of the wording of the policy, because, they alleged, she had never been safely moored at her port of arrival. But the Court held otherwise, deciding that the vessel was *at* Havana in the ordinary sense, that the policy had attached, and that the underwriter was therefore liable.

It often and, indeed, generally happens that when a vessel arrives at a port abroad she is covered by a policy for the outward voyage, including, as we shall presently see, a period varying from twenty-four hours to thirty days after her arrival there. It therefore follows that a vessel on arriving at her port is not infrequently covered for a certain period by both the outward policy and by the homeward policy "at and from." To obviate this duplication or overlapping of insurances it is usual to insert in the last-mentioned policy a clause to the following effect, viz.:—

"*The risk not to commence before the expiry of previous policies.*"

If the insurance be "at and from" a country, such as Brazil, or a district comprised therein, or an island, say Jamaica, which comprises several ports, the insurance on the hull, &c., of a vessel commences immediately upon the arrival in good safety at any one of the ports in such district or island, and the insurance on cargo immediately on its being shipped at any one of such ports.

THE VOYAGE.

The blank space following the foregoing words "*at and from*" is for the insertion of the voyage or for the period of time which the insurance covers. With respect to the voyage, it is of paramount importance that it should be accurately described. It is always assumed by the underwriter that the ordinary course or track of the voyage contemplated is to be pursued, and if in any special instance it is intended that the usual route shall be departed from, this fact must be communicated to him, such intended departure being usually incorporated in the description of the voyage. In the absence of any such provision it is an implied condition of the contract that the vessel shall follow the course usually adopted in the prosecution of the insured voyage, and any variation therefrom will, as we have already seen, render the policy void.

Change of voyage, unreasonable delay in prosecuting it, and deviation have already been dealt with, and there is, therefore, no need to again refer to these subjects.

With regard to insurances for time the exact date and hour of the commencement and termination must always be inserted in the policy. But if there is no stipulation as to the hour of the particular day on which the insurance is to commence, then the day is deemed to begin from and end at midnight.

It must be further noted that the contract is governed by civil time and not by nautical time, and by English, *i.e.*, Greenwich mean time, and not the time of the place where the vessel may happen to be.

"*Including risk of craft to and from the vessel.*"

These words do not appear on the ordinary Lloyd's form of policy though always in a Company policy, but they are included in Lloyd's form of policies on goods by means of a clause, the terms of which vary. The incorporation of these words in the policy, or their introduction by means of a clause, is rendered necessary by the fact that in the absence of such special wording the risk of craft whilst loading is not covered by the ordinary wording of the policy, the risk on goods commencing, as we shall presently see, "from the loading thereof on board the good ship or vessel." Risk of craft at the port of discharge, if craft are ordinarily and usually employed for such purpose, is covered by the ordinary policy without special proviso, as it protects the goods, as we shall also presently see, until they are "discharged and safely landed."

It must be noted, however, that in discharging the usual and customary methods of trade must not be departed from. For example, a merchant is not justified in taking delivery of his goods at a place or time materially different from that which prevails as the ordinary custom of the port. Similarly, the lighterage contemplated under the policy is the ordinary extent of lighterage, and would not include a lighterage, for a merchant's special purposes, of, say, seven miles when, in the ordinary course, it would be trifling.

If any special contract with the lighterman is entered into whereby the ordinary terms of lighterage are so varied as to alter or increase the ordinarily accepted risk, this fact must be communicated to the underwriter when the risk is effected, otherwise the insurance will be void on the ground of concealment. An important case in this connection is that of *Tate v. Hyslop* (1885, V. Asp. M.L.C., p. 487). In that case the policy included the risk of craft to and from the vessel. Whilst discharging, a loss in craft occurred. It transpired that the contract between the assured and the lighterman contained a provision that in the event of loss there should be no recourse against the latter, in consideration of

which exemption the lighterage contract was obtained at a reduced rate. As the existence of this stipulation was not disclosed to the underwriter—a stipulation which, on his paying the loss, would deprive him of any right of recovery from the lighterman in the name of the assured—it was held to be the concealment of a material fact which vitiated the policy.

Another point is that the lighterage must actually be the termination of the voyage insured, and not the beginning of a new voyage, as, for example, taking the goods for transhipment to an export vessel, in which case the delivery into lighter is a constructive delivery to the assured and terminates the insurance, thereby rendering any subsequent loss in craft not recoverable. (*Houlder v. Merchants Marine Insurance Co.*, (1886), L.R., 17 Q.B.D., 354.)

> "*Upon any kind of goods and merchandise, and also upon the body, tackle, apparel, ordnance, munition, artillery boat and other furniture of and in the good ship or vessel called the . . .*"

This antiquated wording was framed when the ship and the goods she was carrying generally belonged to one and the same person. In order to meet modern requirements it is now usual to insert in the space provided in the policy for the valuation (to which we shall come presently) a description of the subject matter of the insurance. As previously mentioned, such written details control, or, may be, override the printed wording of the contract.

NAME OF VESSEL.

The name of the vessel should be inserted in the policy in the space provided for that purpose. When once an insurance on cargo has been effected, the vessel cannot be changed unless with the consent of the underwriter, although the vessel so substituted may be far superior to the original one. But if the original vessel meets with disaster during the voyage, and is so disabled as to necessitate the transhipment of the cargo to another vessel for safety or for conveyance to destination, the

insurance covers the goods whilst on the transhipping vessel, and if she should be lost, the loss of the goods would be recoverable under the policy.

"*Whereof is Master for this present voyage . . . or whosoever else shall go for master in the said ship.*"

Here is a space for the insertion of the name of the master of the vessel, but this space is not often filled in. The wording provides that if, whether by accident, illness or otherwise, the master originally named should be prevented from taking command, then a substitute may be appointed. But the words "or whosoever else shall go for master," would not justify, for example, an assured representing to the underwriter that a well-known and experienced master would have command of a vessel in order to get him to favourably to regard the risk, knowing all the time that it was never intended for that master to sail in the vessel.

"*Or by whatsoever other name or names the same ship or the master thereof is or shall be named or called.*"

These words provide for cases where a mistake or inaccuracy has occurred in the spelling or otherwise of the name of the vessel or master. Such mistakes have no effect on the validity of the contract provided the underwriter has not been misled thereby; but if, on the other hand, the underwriter has been misled, however innocently and without fraud, the insurance is void.

COMMENCEMENT OF RISK ON SHIP.

I have already fully dealt with this in discussing the distinction between an insurance "from" and "at and from" a port. (*Vide p.* 21 *supra.*)

COMMENCEMENT OF RISK ON GOODS (AND FREIGHT)

"*Beginning the adventure upon the said goods and merchandise from the loading thereof aboard the said ship.*"

In the absence of any special clause, therefore, the risk on Goods (and Freight) commences immediately, and not until, the

goods are on board the vessel. We have already noticed, however, that it has become usual to insert the words "including risk of craft to and from the vessel" (in fact, these words are printed in Company policies) and we have considered the meaning and effect of this clause.

TERMINATION OF RISK ON SHIP.

"*Upon the said ship, &c., until she hath moored at anchor twenty-four hours in good safety.*"

So that with regard to an insurance on hull for voyage, after the ship has arrived at her port of destination, the insurance continues to protect her "until she hath moored at anchor twenty-four hours in good safety." In the case of a vessel with cargo on board it is not only necessary that she should have arrived *at* the port, but she must be moored at the usual place for the discharge of cargo before the twenty-four hours will commence to run. Sometimes it is agreed in voyage policies on hull, &c., to cover the vessel for thirty days after arrival, and in the absence of some wording to the contrary, such an addition would cover the vessel for thirty days after the expiry of the twenty-four hours. (*Mercantile Marine Insurance Company v. Titherington* (1864), 11, L.T.N.S., 340). In covering a vessel for thirty days after arrival, however, it is usual to delete the words "twenty-four hours," for the reason already mentioned with reference to stamp duty. (*Vide p.* 16 *supra.*)

The most important point with regard to this phrase is to ascertain the meaning of "good safety." These words cannot imply absolute and complete safety, otherwise the happening of a trifling accident would prevent the vessel being considered to have arrived in good safety. On the other hand, she must not be in a sinking condition and artificially kept afloat for the twenty-four hours. (*Shaw v. Felton* (1801), 2 East 109). The vessel must be, however, in good physical safety, *i.e.*, in such a condition as will enable her to safely discharge her inward

cargo and to generally perform the business ordinarily expected of a vessel at her port of destination.

In this connexion let us glance at the celebrated case of *Lidgett v. Secretan* decided in 1870 (L.R. 5 C.P. 190). The vessel "*Charlemagne*" was insured from London to Calcutta and for thirty days after arrival. On entering the River Hooghly, she struck a bank, damaging her steering gear; and her after compartment filled with water and necessitated constant pumping to keep her afloat. In this condition she arrived at Calcutta on 28th October, was duly moored and discharged her cargo. On 12th November she was taken to a dry dock for repairs, and whilst there she was, on 5th December, destroyed by fire. The fire occurred 23 days after the vessel had been placed in dock, and 38 days after she had moored at Calcutta. The question to be determined was whether the thirty days in the outward policy had terminated prior to the loss. The Court decided that the policy had terminated, inasmuch as the vessel, though disabled, had been kept afloat by the exertions of the captain, had moored at the usual place for discharging cargo, had discharged her cargo, and had remained in possession and control of her owners until the expiration of the thirty days.

TERMINATION OF RISK ON GOODS (AND FREIGHT).

"*And upon the Goods and Merchandises until the same be there discharged and safely landed.*"

The moment of termination of the risk on Goods (and Freight) is, therefore, in the absence of any other stipulation, that of the goods being "safely landed." If, by the custom of the trade, the landing of the goods is performed by means of lighters or other craft, the insurance, as already mentioned, covers them while they are in such craft.

"*And it shall be lawful for the said ship, &c., in this voyage to proceed and sail to and touch and stay at any Ports or Places whatsoever without prejudice to this insurance.*"

This liberty, however, widely as it reads, is not unlimited. The ports called at must be in the ordinary course of the voyage

insured, and further, the calling must be for some justifiable purpose in connection with the adventure. But this has already been fully dealt with in relation to the voyage insured. (*Vide p. 23 supra.*)

"*The said ship, &c., Goods and Merchandises, &c., for so much as concerns the Assured, by agreement between the Assured and Assurers, are and shall be valued at . . . .*"

The space which here follows is for the insertion of the valuation, and where the value as between the assured and underwriter has been agreed upon, it cannot be re-opened, unless it is indeed so out of proportion to the real value of the thing insured as to amount to fraud or wagering, or unless it is a case of clearly proved *bona fide* mistake.

As I have already observed, it is usual to insert in this space also a description of the subject matter of the insurance, whether it be Hull, etc., Goods, Freight, Bullion, Profits or Commissions. &c., &c.

A policy, other than an "open" or "floating" policy, without a valuation is, comparatively speaking, seldom met with nowadays. The usual wording adopted in policies is:—

On (Goods, Hull, &c.) so valued: or valued at £——.

In the absence of any such words the value is deemed "open," and subject to proof, on the lines laid down by legal decision, and as expressed in § 16 of the Marine Insurance Bill. The section reads as follows, viz:—

"Subject to any express provision or valuation in the policy, the insurable value of the subject-matter insured must be ascertained as follows:—

i. In insurance on ship, the insurable value is the value at the commencement of the risk of the ship, including her outfit, provisions and stores for the officers and crew, money advanced for seamen's wages, and other disbursements (if any) incurred to make the ship fit for the voyage or adventure

contemplated by the policy, plus the charges of insurance upon the whole.

The insurable value, in the case of a steamship, includes also the machinery, boilers, and coal and engine stores if owned by the assured, and in the case of a ship engaged in special trade, the ordinary fittings requisite for that trade.

ii. In insurance on freight, whether paid in advance or otherwise, the insurable value is the gross amount of the freight at risk of the assured, plus the charges of insurance.

iii. In insurance on goods or merchandise, the insurable value is the prime cost of the property insured, plus the expenses of and incidental to shipping and the charges of insurance upon the whole.

iv. In insurance on any other subject-matter, the insurable value is the amount at the risk of the assured when the policy attaches, plus the charges of insurance."

An example of an unvalued policy is an insurance say for £1,000 on 100 bales cotton—no mention of the value of the 100 bales being made.

It is most important to remember that in the case of total loss of goods, if the policy be unvalued, no "profit" (the usual 10%, 15% or whatever merchants usually anticipate and accordingly insure) no such profit is to be taken into account in ascertaining the insurable value of the interest.

PERILS.

"*Touching the adventures and perils which we the assurers are contented to bear and do take upon us in this voyage, they are of . . .*"

Here follows an enumeration of the risks which the underwriter agrees to take upon himself. The losses in respect of them subdivide themselves into two classes:

i. Total loss. ii. Average.

These classes form the subject of subsequent consideration, and we will therefore now proceed to examine the perils enumerated in the policy

First of all there appears

"*Perils of the Seas.*"

As a definition of what this term implies I do not think that I can do better than quote the words of Lord Herschell in the case of the "*Xantho.*" (1887, VI. Asp. M.L.C. 207.) "I think it is clear," his Lordship said, "that the term 'perils of the sea' does not cover every accident or casualty which may happen to the subject matter of the insurance on the sea. It must be a peril 'of' the sea. Again, it is well settled that it is not every loss or damage of which the sea is the immediate cause that is covered by these words. They do not protect, for example, against that natural and inevitable action of the winds and waves which results in what may be described as wear and tear. There must be some casualty, something which could not be foreseen as one of the necessary incidents of the adventure. The purpose of the policy is to secure an indemnity against accidents which may happen, not against events which must happen."

"*Fire*"

is the next peril which is mentioned, and the underwriter is liable for the loss or damage occasioned by it, provided, however, that the fire has not been brought about by any cause for which the assured is deemed to be responsible.

And so far as a policy on Freight is concerned, it is not necessary that there should have been actual combustion to entitle the assured to recover as for a loss from fire. It will be sufficient if there is an existing state of *peril* of fire—not merely a fear of fire. This was decided in the case of the "*Knight of St. Michael*" (1897, VIII. Asp. M.L.C. 360, III. Com. Cas., 62), where a cargo of coal was so heated as to necessitate its discharge and sale of a portion of it at a port of refuge. The defendant underwriters did not rely as a defence on unseaworthiness of ship arising out of dangerous condition of cargo when shipped. Mr. Justice Barnes decided that the Freight on the coal so sold was recover-

able under a policy on freight, the loss, though not a loss by fire, was a loss *ejusdem generis*. In the course of his judgment Mr. Justice Barnes said:—"Cases were cited to show that a loss caused by steps taken in consequence of fear of peril, and not to avert an existing peril, is not covered by an ordinary marine policy. It was not disputed that if fire had in any degree actually broken out, and the loss in question had happened to avert its consequences, the plaintiffs could recover directly from the defendants. Now, I have found that fire did not actually break out, but it is reasonably certain that it would have broken out, and the condition of things was such that there was an existing state of peril by fire, and not merely a fear of fire. The case is peculiar, and not analagous to that of any other peril. The danger was present, and, if nothing were done, spontaneous combustion and fire would follow in natural course." (III. Com. Cas. at p. 66.)

"Men of War, Enemies."

These words include all damage or loss sustained owing to the hostile acts of an enemy. But the more common result of hostile operations on the seas is Capture. Capture has been defined as "a taking by the enemy as prize, in time of open war, or by way of reprisals, with intent to deprive the owners of all dominion or right of property over the thing taken." (Arnold on Marine Insurance, VII. Ed. S. 829).

As previously mentioned, a policy does not cover the risk of capture of enemy's property by British war vessels.

"Pirates, Rovers."

These words cover losses caused by marauders as opposed to persons authorised by Governments or States.

The term Pirates does not only apply to depredators on the seas. It has been held to apply to an Irish meal mob who, in the time of famine, took possession of a vessel with a cargo of corn which happened to be off the coast, ran her on to the rocks

and compelled the master to sell the corn at a low price (*Nesbitt v. Lushington* (1792), 4 T.R. 783).

The word Rovers is apparently another term for pirates.

"*Thieves.*"

The policy only covers loss by theft when the theft is a forcible or violent robbery *(latrocinium)* and it does not cover loss by clandestine theft *(furtum)* or pilferage, which, it is presumed, could have been prevented by the exercise of due diligence on the part of the master.

"*Jettisons.*"

Losses by jettison are recoverable under the policy. Jettison has been defined to be:—"the throwing overboard a part of the cargo, or any article on board of a ship, or the cutting and casting away of masts, spars, rigging, sails or other furniture for the purpose of lightening or relieving the ship in case of necessity or emergency." (Phillips on Insurance, V. Ed. §1278).

Goods which have been jettisoned still remain the property of their owners; and if they should be salved or picked up or otherwise recovered, the owners can claim them on payment of the salvage charges attaching to them.

But no jettison of cargo owing to its inherent vice is covered by the policy. For example, the jettison of fruit which has become rotten owing to a protracted voyage, or of hemp which has become dangerously heated. Nor is a loss by jettison recoverable if the things jettisoned have been improperly carried in an insecure place. For example, one of the customs of Lloyd's provides that:—"Water casks or tanks carried on a ship's deck are not paid for by underwriters; nor are warps or other articles when improperly carried on deck."

Of course, if the policy provides for the carriage of goods on deck, or if from the nature of the cargo (*e.g.*, carboys of vitriol) it is apparent that the only fit place for its stowage is on deck, the loss by jettison of it will be recoverable, unless excluded by special warranty to the contrary.

"*Letters of Mart (or more commonly called "Marque") and Countermart.*"

Letters of Mart were commissions granted by the Sovereign or Government whereby the holders were empowered to make reprisals on an enemy's shipping in respect of losses which the enemy had inflicted on them. Letters of Countermart were, if the may be so termed, counterblasts to Letters of Mart, authorising resistance to holders of Letters of Mart and also reprisals.

"*Surprisals and Takings at Sea.*"

These words require no explanation, being merely another way of expressing "*Capture.*"

"*Arrests, Restraints and Detainments of all Kings, Princes and People of what nation, condition or quality soever.*"

Arrests, Restraints and Detainments are distinct from, and not to be confounded with Capture. To quote the words of Mr. Justice Brett in the case of *Rodocanachi v. Elliott* (1874, II. Asp. M.L.C. 399):—"Capture is taking possession with intent to change the property; arrest is taking with intent ultimately to restore to the owner; restraint, a prevention of the goods going." But it is difficult to see any difference in the meaning of the words, or distinguish between the terms, "*arrests*," "*restraints*" and "*detainments.*" They seem to be synonymous terms—an arrest is a restraint, and a restraint is a detainment.

"*Barratry of the Master and Mariners.*"

The term "Barratry" includes every wrongful act wilfully committed by the master and crew to the prejudice of the owner or, as the case may be, the charterer (First Schedule, Marine Insurance Bill, S. 12). And to constitute barratry the act must have been committed without the connivance of the owner. Examples of barratry are scuttling a ship; or intentionally running her on shore; or setting fire to her; or fraudulently

selling both ship and cargo and appropriating the proceeds; smuggling, &c.

"ALL OTHER PERILS."

"And of all other perils, losses or misfortunes that have or shall come to the hurt, detriment or damage of the said goods and merchandise and ship, &c."

At first sight it would seem that so comprehensive a wording as "all other losses" would include losses from whatever source arising. But it is not so. The "all other perils, losses and misfortunes" covered by the policy are those of a like kind with those already specially enumerated—perils or losses *ejusdem generis* with those which have been specified.

SUE AND LABOUR CLAUSE.

"And in case of any loss or misfortune it shall be lawful to the assured, their factors, servants, and assigns to sue, labour and travel for, in and about the defence, safeguard and recovery of the said goods and merchandises and ship, &c., or any part thereof without prejudice to this insurance; to the charges whereof we, the assurers, will contribute each one according to the rate and quantity of the sum herein assured."

The agreement embodied in this well-known and often quoted clause is supplemental to and distinct from the contract of insurance. Although permission is accorded to the assured to use endeavours or to take steps in mitigation of any loss which has occurred to the subject matter of the insurance, yet it must be always remembered that it is the duty of the assured to do everything reasonably within his power to save the property assured, or to minimise a loss which has happened—conventionally expressed "to act as if uninsured." When any steps have been taken by the assured or their servants with this object in view, the underwriter agrees by this clause to pay his proportion of any expenses which may have been properly so incurred, always provided, however, that the expenditure has been made with a view to averting or minimising a loss for which the

underwriter is liable under his policy. (*Booth v. Gair*, 33 L.J.C.P. 99. *Kidston v. Empire Marine I. Co.* L.R. 2 C.P. 357). For example, if the insurance be against the risk of "Total loss only," and the expenses are incurred to diminish depreciation by seawater or other form of partial loss, such expenses would not be recoverable, the risk of partial loss not being covered by the policy.

Although in case of emergency or accident the master becomes agent both for the shipowner and the owner of the cargo, in any steps he takes to minimise the loss in respect of a specific interest he must act prudently, and, if practicable, he should communicate with the owner of the property before he resorts to any extreme measure, such as, for example, the sale of cargo or of ship when the vessel has put in to a port of refuge. In these days of rapid post and the cablegram, the master is in almost every case in a position to so communicate with the owner of the property. But in the old days, before the invention of the telegraph, the situation was of course very different.

It will be noted that the permission to "sue, labour and travel for" is specifically given to the "*assured, their factors, servants and assigns.*" It, therefore, follows that the charges contemplated by this clause must be incurred by the assured himself or by his servant, and by them only. (*Uzielli v. Boston Marine Insurance Co.*, 1884, V. Asp. M.L.C. 405.)

"General average and salvage do not come within either the words or the object of the suing and labouring clause." Those are the words of Lord Blackburn in delivering judgment of the House of Lords in the case of *Aitchison v. Lohre* (1879, IV. Asp., M.L.C. 168). "General Average" and "Salvage," however, are subjects for future consideration. (*Vide p.* 75 and 96 *infra.*)

The underwriter is only liable for "sue and labour" charges provided they have been reasonably and prudently incurred. To illustrate this let me refer to the case of *Lee v. Southern Insurance Co.* (1870, L.R. 5 C.P. 397). The insurance was on freight. The vessel stranded, and the cargo was discharged

and forwarded to destination by rail, and the shipowner by this means earned and received his freight. The vessel was subsequently floated, so that the cargo could, in fact, have been forwarded by her—a much more economical proceeding than forwarding it by rail. The Court held that, in the circumstances, the underwriter on freight was only liable for so much of the actual expenditure as would have been incurred had the cargo been sent on by the cheaper and therefore reasonable and prudent method.

Expenditure under the "sue and labour" clause is borne by the underwriter in the proportion that the amount of his policy bears to the total insured value. Consequently, if the whole value of the interest is insured under the policy, the underwriter pays the whole of the "sue and labour" charges.

WAIVER CLAUSE.

"*And it is expressly declared and agreed that no acts of the assurer or assured in recovering, saving or preserving the property assured shall be considered as a waiver or acceptance of abandonment.*"

It is hardly necessary for present purposes to examine the origin of this clause. Suffice it to say that it is now incorporated in the printed wording of all the Company policies, and also many of those at Lloyd's, though for many years after its introduction it was attached by means of a separate clause. It is simply a provision that in the event of a casualty either party to the contract—either assured or underwriter—may take such steps, or incur such expenses as are contemplated under the "sue and labour" clause to minimise a loss, without prejudice to the rights of the assured on the one hand and the underwriter on the other.

"*And so we, the assurers, are contented and do hereby promise and bind ourselves, each one for his own part, our Heirs, Executors, Administrators and Assigns to the Assured, their Executors, Administrators and Assigns for the true performance*

of the premises, confessing ourselves paid the consideration due unto us for this Assurance by the Assured at and after the rate of . . ."

In these concluding words the underwriter acknowledges having actually received the premium which he has charged for undertaking the risk. As a matter of fact, however, the premium is, unless the case is exceptional, never paid at the time, but some time subsequently, usually on the 8th of the month following the execution of the policy. The object of the insertion of this acknowledgment is to prevent the underwriter, in case of loss, from raising any question relative to payment of the premium—the consideration due to him. Suppose, for example, a broker had been employed to effect an insurance on behalf of a client, and that the assured had paid the premium to the broker, and that the broker became a bankrupt before paying the underwriter. In the event of loss, the underwriter would have to pay in full to the assured without setting off the unpaid premium.

THE "MEMORANDUM."

The "Memorandum" at the foot of the policy ("*Corn, Fish, Salt*, etc.") was introduced into the wording of the policy in 1749. It is really a limitation of the underwriter's liability so far as concerns Particular Average, and consideration of it may, therefore, be deferred until we come to deal with that subject.

F. C. & S. CLAUSE.

The risks of Capture, Seizure and Detention, and the risks of war or warlike operations are often, and more especially in times of war, excluded from the contract. This is effected by the insertion in the policy of what is known as the Free of Capture clause—the F. C. & S. clause. The following is the latest clause, and the one in general use, though the clause takes various forms:—

"*Warranted free of Capture, Seizure and Detention, and the consequences thereof, or any attempt thereat, Piracy excepted, and*

also from all consequences of Riots, Civil Commotions, Hostilities or Warlike operations, whether before or after declaration of War."

It did not appear in the original wording of the policy, but was formerly attached to the policy as a special clause or rider. In view of the fact, however, that this clause has come into daily use, even if only for the negative purpose of its deletion, it has for many years been printed as an overriding part of the policy; and it is now ruled out if the risks of capture, seizure, &c., are to remain covered as expressed in the policy. It should be noted that the F. C. & S. clause, when not deleted, overrides the wording of the body of the policy so far as concerns all or any of the words which are opposed to the stipulations of the clause, for example—"arrests, restraints and detainments, &c."

With regard to the term "Capture" of which risk the underwriter is under this clause warranted free, it is not necessary that the capture shall be the result of an act of war. All kinds of capture come within the meaning of the term. Under this warranty it matters not whether the act done be lawful or whether it be unlawful, whether by mutinous passengers, or persons armed with state authority; the underwriter is not liable. (Arnold on Marine Insurance, VII. Ed. S. 829).

With regard to an insurance which covers the risk of capture, it is necessary to bear carefully in mind that the abandonment of the voyage owing to *fear* of capture—however reasonable or well-founded the fear may be—will not entitle the assured to recover under the policy. This was decided in the recent case of *Nickels v. London & Provincial Marine & General Insurance Company.* (1900, VI. Com Cas. 15). In that case a cargo of rice had been shipped on board a Spanish steamer for conveyance from Liverpool to Cuba, the insurance being solely and expressly against war risk only; only against all risks excluded by the F. C. & S. Clause in the original policy. After the vessel had sailed, war broke out between Spain and the United States. The master on learning the fact, put back to

Liverpool and landed the cargo, freight thereon being paid in accordance with special stipulations in the bill of lading, which provided that if as a consequence of war the master should deem it imprudent to enter the port of destination he might land the rice at any other convenient port, the whole freight in such event being considered as earned. Some of the rice was warehoused at Liverpool, and some was sold. The plaintiffs claimed to recover under the policy the amount of freight which they had had to pay, and the warehouse charges. But Mr. Justice Mathew held that the loss was not a consequence of hostilities within the meaning of the policy, but was due to the exercise by the master of the power given him by the bill of lading, and that there was therefore no liability under the policy. This judgment is based on the theory of *causa proxima*, which theory we will now proceed to consider.

CHAPTER III.

CAUSA PROXIMA.

Before proceeding to consider the various kinds of claims which may arise under the policy and the methods which regulate their adjustment, it is necessary that we should clearly understand the fundamental principle underlying the contract, viz:—that in order to render the underwriter liable for a loss, such loss must have been proximately caused by a peril insured against. This well-known legal principle "*Causa proxima non remota spectatur*," (*i.e.*, that the *proximate* and not the remote cause is to be looked to) is most rigorously applied to the contract. It will not be inappropriate if in this connection are quoted the words of Lord Esher, M.R., in the case of *Pink v. Fleming* (1890, VI. Asp. M.L.C. 554) one of the cases in which this question of *causa proxima* arose. The Master of the Rolls said :—"The question, which is the *causa proxima* of a loss, can only arise where there has been a succession of causes. When a result has been brought about by two causes, you must, in marine insurance law, look only to the nearest cause, although the result would, no doubt, not have happened without the remote cause."

The insurance in that case was on a cargo of oranges, etc., and was warranted free from partial loss or damage, unless such loss or damage was *consequent on collision* with any other ship. The vessel was in collision during the voyage and had to be put into a port for repairs. In order that these repairs could be effected it was necessary to discharge the fruit into lighters and subsequently reload it. When the vessel arrived at her destination it was found that the fruit was considerably damaged, partly by the handling involved in putting it in lighters and reloading it, and partly from natural decay which in consequence of its perishable nature, arose owing to the delay in the voyage.

The question was whether this damage to the fruit was consequent on or caused by the collision within the meaning of the policy or not. The Court decided that the loss was not recoverable. "But the proximate cause of the loss," said Lord Esher, M.R., "was the handling of the fruit, though no doubt the cause of the handling was the necessary repairs, and the case of putting into port for repairs was the collision. There were three causes of the result, but according to the English Law of marine insurance, only the last of them is to be looked at for the purpose of determining the liability of the underwriters."

The case of *Cory v. Burr* (1883, IV. Asp. M.L.C., 109) affords another interesting illustration of the strict appreciation of the principle of *causa proxima*. A ship was insured under a time policy in the usual form (including the risk of barratry) and was "warranted free from capture and seizure, and the consequences of any attempt thereat." In consequence of smuggling (barratry) by the master, the ship was seized by Spanish Revenue Officers. In an action on the policy to recover expenses incurred by the owner to obtain the release of his vessel, it was held that the proximate cause of the loss was capture and seizure, and *not* the barratry of the master, and that therefore the underwriter was not liable.

Let us take one more example. An underwriter is not liable for damage directly caused by rats. But suppose a rat gnawed a hole in a bath-room pipe on board the vessel, in consequence of which sea-water flowed through the hole into the hold and damaged the cargo. The proximate cause of the damage is seawater, and the underwriter is liable, the rat's partiality for lead pipe being the remote cause. (*Laveroni v. Drury*, 8 Ex. 166).

It must be noted that an underwriter is not liable for any loss if it be caused by the fault or the personal misconduct of the assured himself. In such an event, the fact of the loss having been proximately caused by a peril insured against is beside the question. The underwriter is exonerated.

But any loss directly caused by a peril insured against must—i.e., up to the sum insured—be paid for by the underwriter, notwithstanding the fact that the said loss has been brought about by bad navigation, neglect or fault of the master or seamen or any other cause not directly insured against, with the one exception which I have just mentioned :—the fault of the assured himself. If a ship is destroyed by fire owing to the carelessness of a seaman in lighting a fire in the cabin, and then leaving her with watchman on board; or if a vessel drifts on the rocks because the mate at the helm has fallen asleep; or if she is damaged by collision owing to a bad, or no look-out, or to a mistake of the man at the wheel; in all such cases the underwriter is undoubtedly liable.

In the case of the goods, the damage must be actual damage to the goods themselves, not suspicion of, or what is called sentimental, damage. Suspicion of damage does not concern the underwriter; and although one part of a shipment, being sound, sells at a lower price than it would otherwise have done in consequence of the other part being sea-damaged, the loss occasioned thereby is not one for which the underwriter is liable. This was decided in the case of *Cator v. Great Western Insurance Co. of New York*, (1873, II. Asp. M.L.C. 90). Some chests of perfectly sound tea sold at a depreciation in consequence of some chests of the same chop, or brand, having been damaged by sea-water, the suspicion being that the flavour of the sound tea was also affected. The suspicion proved ill-founded, and it was decided that the underwriters were not liable for the loss.

CHAPTER IV.

ACTUAL AND CONSTRUCTIVE TOTAL LOSS.

Total losses may be sub-divided into two classes, *actual* total loss and *constructive* total loss. An insurance against the risk of "total loss only" includes the risk of both actual and constructive total loss, unless a stipulation to the contrary appears in the policy. When either an actual or constructive total loss has occurred it of course involves payment under the policy of the full sum or valuation insured.

ACTUAL TOTAL LOSS.

An actual total loss occurs (to use the words of the Marine Insurance Bill) where the subject matter insured is destroyed or irreparably damaged, or where the assured is irretrievably deprived thereof. (§ 58. 1,).

Goods are deemed to be irreparably damaged where they are so damaged as to cease to exist in specie, or, so that they cannot be rendered capable of arriving at their destination in specie, *i.e.*, when they no longer answer to the denomination under which they were insured (§ 58, 2,), or, in other words, to be capable of utilisation as the thing insured (Bramwell, B. in *Rankin v. Potter* (1873), II. Asp. M.L.C. 65).

As an illustration the well-known case of *Roux v. Salvador* (1836, 3 Bing. N.C. 266) may be mentioned. That case arose out of a shipment of hides from Valparaiso to Bordeaux. During the voyage the vessel met with heavy weather, sprang a leak, and put into Rio de Janeiro. It was there found that the hides were so damaged by sea-water as to be in a state of incipient putridity. If they had been carried on to Bordeaux they would have become entirely putrid and valueless as hides, and they were consequently sold at Rio. This was held to be a total loss.

Foundering at sea in a gale, or sinking after collision, or a vessel which is "missing" are simple instances of actual total loss of ship, cargo, and freight.

The most important document necessary to substantiate a claim for total loss is, if any of the crew are saved, the "protest," a document giving a detailed account of the casualty, and sworn before a Notary or Consul. In the case of goods, the invoice and bills of lading relating to the shipment are required by the underwriter, these being evidence that the insurance was *bona fide* and that the goods were actually on board. Of course the policy has also to be produced, and this is usually retained by the underwriter after he has settled the claim.

CONSTRUCTIVE TOTAL LOSS.

A constructive total loss has been defined (McArthur, Contract of Marine Insurance, II. Ed. 146) as follows:—"A constructive total loss occurs when the subject insured, though existing in specie, is justifiably abandoned on account of its destruction being highly probable, or because it cannot be prevented from actual total loss unless at a cost greater than its value would be if such expenditure were incurred."

As a "nut-shell" illustration of the general principle underlying the doctrine of constructive total loss, let us suppose that a man dropped a sovereign down a well. The sovereign exists, and it could be recovered at a price, but what man would be foolish enough to spend say £5 in order to recover a sovereign? That sovereign is a constructive total loss.

When a casualty has occurred involving a constructive total loss, it is a condition precedent to the right of recovery that the assured shall give to the underwriter what is termed "Notice of Abandonment," unless, as a matter of fact, the circumstances of the case are such as to render the giving of such notice unnecessary or impracticable, as, for example, where news of the reported loss of a vessel was received by the owner at the same time as the announcement that the wreck had been sold.

In such circumstances the abandonment would be superfluous, and the omission to tender it would not deprive the underwriter of any material benefit.

An abandonment is the surrendering of the property insured, or what remains of it, to the underwriter, and claiming from him a total loss, this cession of right being necessary in order to entitle the underwriter to whatever remains of the property, and to enable him, if he so wishes, to take means for the protection of his own interests. There is no special form of Notice of Abandonment, but it is usual for the word "abandon" to be used therein.

Now let us consider as to the *time* when notice of abandonment should be given, if the owner of the property elect to abandon. The mere report of the happening of a casualty does not justify an assured in abandoning. He must wait until such sufficient details are to hand as will enable him to form an opinion as to the situation, and to make up his mind as to the course which he will elect to adopt. When this information has reached him he must act without delay. He must not wait with a view to a change of circumstances which will enable him to form an opinion as to whether it will be better for him to save the property instead of abandoning it to the underwriter. If the assured omit to abandon at the proper time, the right to abandon has gone, unless, indeed, the happening of subsequent circumstances should revive his right to abandon, as we shall presently see.

Although Notice of Abandonment is essential in cases of constructive total loss, and although sufficient information must have been obtained to enable a proper decision to have been come to by the assured, it must not be inferred that the state of facts at the time of abandonment is, *ipso facto*, to determine whether the property is to be legally regarded as a constructive total loss or not. Of course, if the underwriter accepts the abandonment these considerations would not arise—he simply pays a total loss, and realises as much as he can with the property which has been abandoned to him.

But in the event of the underwriter declining (as he usually does) to accept the abandonment, it is then necessary, if the assured desire to legalise his abandonment, *i.e.*, to enforce his alleged claim for constructive total loss, for him to issue a writ against the underwriter to recover the loss. And it is the state of facts existing at the time when the writ is issued against the underwriter which has to be taken into consideration to ascertain whether or not a constructive total loss has occurred. It is most important to remember this, as it is a vital distinction between English law and that of most foreign countries. To quote words of Lord Herschell:—"If in the interval between the notice of abandonment and the time when legal proceedings are commenced, there has been a change of circumstances reducing the loss from a total to a *partial* one, or, in other words, if at the time of action brought the circumstances are such that a notice of abandonment would not be justifiable, the assured can only recover for a partial loss." (*Sailing Ship Blairmore Co. v. Macredie*, 1898, III. Com. Cas. at p. 258).

It must be remembered, however, that a Notice of Abandonment, unless accompanied or followed by a writ, is of no legal value.

A change of circumstances between the time of the issuing of writ and the time when the action is actually tried is not to be regarded. This was decided in the case of *Ruys v. Royal Exchange Assurance Corporation* (1897, VIII. Asp. M.L.C. 294). In that case a ship, insured against risks of war, was captured. Notice of Abandonment was given and declined. A writ was thereupon issued, but before the day of trial the ship was restored to her owners. The Court held, however, that the underwriters were liable for a total loss.

There is one exception, however, with regard to the change of circumstances—the change must not have been brought about by the underwriters themselves. This was decided in the case of the *Sailing Ship Blairmore Co. v. Macredi* (III. Com. Cas., 241). The "Blairmore" was sunk at San Francisco by a

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peril insured against. Notice of abandonment had been given and was declined by the underwriters. The latter proceeded to raise the ship at their own expense, which they were justified in doing under the "waiver clause." The assured then commenced an action to recover a Total Loss, admitting that the actual expenditure necessary for repair at the time of bringing the action would be less than the value of the vessel when repaired, but contending, on the other hand, that the cost of such repairs *plus* the cost already incurred by the underwriters in raising the ship would greatly exceed her repaired value. The underwriters, on the other hand, contended that the expenditure incurred by them should not be taken into account to determine whether or not the vessel was a Constructive Total Loss, and that therefore in the circumstances they were not liable to pay a Total Loss. But the House of Lords decided that the rule of English law as to change of circumstances between the time when notice of abandonment was given and the time of bringing the action was not applicable to a change brought about by the underwriters themselves at their own expense, and judgment was accordingly given against the underwriters,

If in any case an underwriter decides to accept abandonment, he must satisfy the assured of his election without delay. If the underwriter sends no reply to a tender of abandonment (a proceeding which we can hardly reconcile with present-day business methods) then it must be assumed that he declines to accept it. (*Provincial Insurance Company of Canada v. Leduc*, 1874, II. Asp. M.L.C. 338).

In cases where notice of abandonment is declined, there might be a possibility of neither the assured nor the underwriter taking any measures to preserve the property from destruction or lessen loss which has occurred, from the fear that any such action on the part of either of them would operate to their prejudice, by implication;—on the one hand, that abandonment had been accepted by the underwriter, and, on the other, that tender of abandonment had been withdrawn by the assured, and it was in

order to obviate this uncertainty that the "Waiver Clause" was introduced into the policy. The terms of this clause have already been noticed (*vide p. 37 supra*), but for the sake of clearness it may be well to repeat it. It reads:—"It is expressly declared and agreed that no acts of the insurer or insured in recovering, saving or preserving the property insured shall be considered as a waiver or acceptance of abandonment."

CONSTRUCTIVE TOTAL LOSS OF SHIP.

Having come to an understanding as to what is a constructive total loss in theory, and having considered the question of abandonment inseparable therefrom, let us now take a practical illustration of constructive total loss of ship. Suppose a vessel has encountered a gale which has driven her hard on rocks and seriously damaged her. What is to be taken into consideration to ascertain whether or not she is a constructive total loss? The vessel would be a constructive total loss if the cost of repairing her, plus her proportion of the estimated cost of getting her off the rocks to a place of safety, would exceed the value of the vessel when so saved and repaired. For sake of clearness let us take some imaginary figures. Suppose on the one hand:—

The estimated cost of repairing the vessel be ..	£8,000
And the estimated proportion of the expenses of getting her off the rocks and into a port of safety, etc.	3 000
TOTAL	£11,000

Suppose on the other hand:—

The value of the vessel when repaired be.. ..	£9,000

This would clearly be a case of constructive total loss, for no prudent uninsured owner would incur an expenditure of £11,000 to resume possession of a ship of the value of £9,000.

In many cases the answer to the question "What would a prudent uninsured owner do in the circumstances?" provides us with a solution as to whether a vessel is, or is not a constructive total loss. Certainly it would be in circumstances such as the foregoing; but it must not be taken to be a test for all cases which may arise.

As to whether or not the value of the wreck is to be taken into account in determining whether a vessel is or is not a constructive total loss, the Court of Appeal has decided in the case of *Angel v. Merchants Marine Insurance Co.* (The "Times," 8th April, 1903), that such value is not a factor to be taken into consideration in determining the question.

In estimating, in cases of constructive total loss, the amount of the cost of repairs caused by the perils insured against, no deduction (one-third by custom) is to be allowed in respect of amelioration by reason of new material replacing old; nor is there to be any abatement made on account of the extra cost of the repairs in consequence of the old or decayed condition of the vessel, provided, of course, that the warranty of seaworthiness was complied with when she sailed.

With regard to the repaired value of the vessel with which the cost of repairs, etc., has to be compared, this is a matter which not infrequently gave rise to some difficulty in its ascertainment. This difficulty, however, is now obviated by inserting in policies what is known as the "Valuation Clause," whereby it is agreed that the insured value shall be taken as the repaired value in ascertaining whether a constructive total loss has arisen. As an example of the important effect of this stipulation, let us revert to the imaginary figures shewing a constructive total loss of a ship—expenditure £11,000; value of ship when repaired, £9,000. Suppose the vessel had been valued in a policy at £12,000, with the valuation clause providing that this value shall be taken to be repaired value. Under such a policy the expenditure of £11,000 would be less than the stipulated

repaired value £12,000, and there would consequently be no claim for constructive total loss.

CONSTRUCTIVE TOTAL LOSS OF FREIGHT.

A constructive total loss of freight arises "where the ship or goods are so damaged or affected by a peril insured against, that an actual total loss of the freight can only be prevented by an expenditure exceeding in amount the freight which it would be incurred to earn." (Marine Insurance Bill § 61, IV.) If, however, in any case a ship has been abandoned, and the abandonment has been accepted by underwriters on ship, there is held to be a transfer to the latter not only of the ship but also of any freight which she was in course of earning when the casualty happened which gave rise to the abandonment. Consequently if the ship underwriters, after accepting abandonment, repair the vessel and complete the voyage, they are entitled to the freight so earned, and, what is more, the underwriter on freight might not be liable for a total loss inasmuch as the loss had not been caused by a peril insured against, the proximate cause being the abandonment by the shipowner of his vessel to the underwriter on ship. (*Scottish Marine Insurance Company v Turner*, 1853, 1 Macq. H.L. 334).

But if the vessel be at a port of refuge and is there condemned, and the freight is earned by the underwriter on freight by chartering another ship for the purpose of conveying the cargo to destination, the underwriter on freight who has paid a total loss is entitled to the freight so earned, and the underwriter on ship is not entitled to any of it. (*Hickie v. Rodocanachi*, 1859, 28, L.J. Ex., 273.)

CONSTRUCTIVE TOTAL LOSS OF GOODS.

A constructive total loss of goods arises when the goods arrive at a place short of the port of destination. The factors to be considered are (*a*) the cost of reconditioning the cargo, if it be damaged, and (*b*) the cost of forwarding the cargo to

destination if the vessel be condemned. If these expenses, either jointly or severally, exceed the value which the goods would have on their arrival at destination, then there is a constructive total loss of the goods. The course which a prudent uninsured owner of goods would adopt provides, in the case of goods, a solution to the question whether or not there is a constructive total loss. Of course, when the underwriter has settled a constructive total loss he is entitled to receive the net amount which the goods realise by sale at the port of distress, this being called a salvage, and when the underwriter pays the difference between the total insured value and the net proceeds of the goods, such a settlement is called a "Salvage Loss."

CHAPTER V.

PARTICULAR AVERAGE.

Before proceeding to consider claims for particular average it is necessary that we should clearly understand what is meant by that term. Particular average, so called in contradistinction to General Average and Total Loss, is thus defined in the Marine Insurance Bill:—

> § 65, 1. A particular average loss is a partial loss of the subject matter insured, caused by a peril insured against, which is not a general average loss, and which falls exclusively on the owner or other person interested in insurable property, giving him no right of contribution against other persons who may be interested in the common adventure.
>
> 2. Particular charges are not included in particular average.

A vessel, for example, may meet with violent weather, the seas sweeping her decks and causing her to strain severely whereby she sustains serious damage: the damage thereby occasioned is a particular average on ship. And if during the heavy weather sea-water gets into the hold and damages the cargo, the damage to the cargo is particular average on cargo. If it were necessary many more examples of particular average could be given, but the two referred to will be sufficient as illustrations. The damage, as already mentioned, must be accidentally and fortuitously caused by a peril insured against, and it falls solely on the person interested in the subject matter of the insurance and on his underwriter. This should be well remembered, as it is the distinguishing feature between particular and general average, the latter being a subject for future consideration.

Having arrived at an understanding as to what the term particular average means, let us proceed to consider how claims coming under this category are dealt with in relation to the policy.

PARTICULAR AVERAGE ON SHIP.

First of all let us deal with claims for particular average on ship. Suppose a vessel has encountered heavy weather which has seriously strained her: or that her propeller has fouled a piece of floating wreckage, breaking off the blades and damaging the shafting in consequence of the sudden shock. The first question which we must ask ourselves is: —How is the amount of the underwriter's liability to be ascertained? The measure of the underwriter's liability is ordinarily the *actual cost* of repairing the damages sustained by the perils insured against, less deductions "new for old"—one-third or one-sixth as the case may be, unless, as is now usual, the policy provides that the average shall be paid in full, without any deduction new for old. It is most important to remember that in settlement of particular average no regard is paid to the insured value of the vessel as agreed between the assurer and the underwriter. It is the reasonable actual outlay for repairs which forms the measure of the claim, provided, of course, such outlay does not exceed the insured value. If, for example, the vessel be actually worth say £50,000 and she has been valued for insurance purposes, and has been insured for say, only £45,000, the underwriters have, nevertheless, to pay on the basis of the full reasonable cost of executing the repairs.

Now let us consider as to the means to be adopted for the effecting of repairs. In the first place it is necessary that the repairs shall have been prudently effected, and that the cost of them is reasonable, otherwise the additional expenses in consequence of imprudent or unreasonable repair must not be charged against the underwriter. Further, the underwriter is not liable as we have already noticed, for what is termed "wear and

tear." Further, the underwriter must have the benefit of all trade discounts which are usually allowed for prompt payment, whether, as a matter of fact, the bills are paid in cash or otherwise by the owner. He must also be credited with the value of all old materials, such as old iron, ropes, &c.

When the total amount of the particular average has been arrived at by reference to, and dissection of, the repair-bills, it only remains to ascertain the amount recoverable under the various policies. This is done by apportioning the particular average in the proportion which each underwriter's policy bears to the total insured value.

The liability of the underwriter on ship is limited to the amount of his policy so far as any one accident is concerned. But it may, and often does, happen, that a vessel meets with several accidents, and the liability of the underwriter under a time policy, or voyage policy for that matter, may in consequence far exceed the amount of his policy. Suppose, for example, a vessel has during the currency of the policy been damaged, has been repaired, and is subsequently totally lost. The underwriter would in such circumstances have to pay a total loss in addition to the claim for particular average.

It must not be inferred, however, that a shipowner is bound to have his vessel repaired at the first opportunity. He may, if he so elect, defer executing the repairs. If he does so elect, he must wait until the expiration of the risk before he can recover the amount of his claim, and if, in such circumstances, the vessel be totally lost before the expiration of the risk, then the owner can recover for a total loss under his policy, but not for the particular average damage, inasmuch as the repairs had never been effected, and he had consequently suffered no loss so far as they were concerned. And if in such a case it should happen that the total loss was not attributable to a peril insured against, then there would be no liability under the policy whatever, either for a total loss or for unrepaired damage. (*Livie v. Janson*, 12 East, 648).

Let us suppose that particular average repairs have not been effected, that the vessel has not been totally lost and that the policy has expired. The owner may have sold his vessel in her damaged condition. The question then arises:—How is the underwriter's liability in respect of the unrepaired damage in such a case to be ascertained? The ordinary and usual basis is by estimating the cost of the repairs. Another method sometimes adopted is to compare the value of the vessel before the accident with her value after the accident, the difference shewing the depreciation sustained.

An interesting and important point once arose in connection with unrepaired particular average damage and subsequent total loss of the vessel; and it will probably be best if I endeavour to make it clear by putting it in simple form.

Suppose that a vessel, insured with underwriter A for a voyage, sustains particular average damage, and that the damage is unrepaired when the policy expires. Immediately on the expiry of A's policy the vessel is covered for a like sum by a policy of underwriter B. Whilst covered by B's policy and before the particular average damage attaching to A's policy has been repaired the vessel is totally lost. What are the respective liabilities of underwriters A and B? A has to pay the estimated cost of repairing the particular average damage, which is really a clear profit to the owners, whilst B has to pay a total loss. (*Lidgett v. Secretan*, 1871, I. Asp. M.L.C., 95).

It may sometimes happen, however, that the ship is sold by the owner, unrepaired, during the currency of the risk. When that is the case, the amount recoverable is ordinarily computed on the basis of the estimated reasonable cost of repairs, provided, however, that such estimated cost of repairs does not exceed the amount of loss as actually demonstrated by the sale, the loss thus shewn being a factor which must necessarily be taken into consideration in determining the underwriter's liability. (*Pitman v. Universal Marine Insurance Co.*, 1882, C. A., IV. Asp., M.L.C., 544). It is a matter for regret, however, that no judicial

interpretation has been given as to what is to be regarded as the sound value of a vessel for purposes of ascertaining the loss by sale—whether it is to be her value at the commencement of the risk, or just before the accident, or what other value.

There is one question which I would very lightly touch upon before leaving this subject, and that is the method of dealing with dock dues—*i.e.*, cost of dry-docking—where repairs on account of owners, and repairs on account of underwriters, are both executed concurrently in dry dock. It does not come within the province of this hand-book to discuss questions on which opinions may be divided, and in regard to which no legal pronouncement has as yet been definitely obtained. I propose, therefore, to confine myself to endeavour to state the law on the subject so far as it has been definitely ascertained, and in order to do so, I will give a short epitome of the two celebrated decisions of our Courts which deal with this question.

The first case is that of the "*Vancouver*," (*The Marine Insurance Co. v. China Transpacific S.S. Co.*, 1886, VI., Asp., M.L.C., 68). The vessel on arrival at San Francisco from Hong Kong, was found to be very foul, and it was necessary before she could put to sea again to dry dock her for the purpose of cleaning, scraping and painting her, and it was with this object alone that she was put into dry dock. It was then discovered, which was not known before, that her stern post had been fractured whilst at sea. This damage was accordingly repaired, the repairs taking eight days to effect in dry dock, during the first three days of which cleaning, painting, &c., were going on simultaneously. By the operations being performed simultaneously, three days dock dues were saved. The question was whether the underwriters were liable for any portion of the dock dues during the first three days whilst the cleaning, &c., and the repairs of the damage were going on concurrently, and the House of Lords held that in the circumstances the dock dues for the first three days should be divided equally between the shipowner and the underwriter. It should be noted that in

this case the cost of placing the vessel in dry dock was not in dispute—it was only the cost of the three days dock-dues for hire of the dock. But the judgment extends also to the cost of entering and leaving the dry dock.

The second case is that of the "*Ruabon*." (*Ruabon S. S. Co. v. London Assurance Corporation*, 1899, V. Com. Cas. 71). The vessel grounded, and was dry docked for the purpose of examination, and, in case of need, of repairing the consequent average damage. This was in January, 1896. In the following November, it would have been necessary, in the ordinary course, for the vessel to have been put in dry dock for Lloyd's classification survey in order to retain her class, but the rules of Lloyd's allow the survey to be anticipated if the owner so elect. The owners in this case took advantage of the opportunity of the vessel being in dry dock in January for average repairs, to have her surveyed for the purpose of retaining her class. The underwriters contended that in these circumstances, part of the docking expenses—which would otherwise have had to be specially incurred—should be borne by the owners. But the House of Lords, reversing the decisions of the Commercial Court and Court of Appeal, decided that the docking expenses (including the cost of putting in and taking out of dock, as well as dues for the hire of the dock) were to be borne solely by the underwriters, and that the owners were not liable to pay any proportion thereof.

Two legal principles seem to underlie the judgment in the latter case, one being, that termed "common user"; and the other being, that a shipowner is entitled to any "incidental advantage" from the fact that damage has arisen from a risk within the policy which has necessitated repairs at the expense of the underwriter.

The judgment in the case of the "*Acanthus*" (IX. Asp. M.L.C. 276) should also be referred to by those of my readers who desire to further consider this interesting question.

Let us now briefly consider the method of dealing with expenses incurred in removing a vessel for repair. If a vessel is in need of repair at any port and is removed thence to some other port for the purpose of repairs, either because the repairs cannot be effected, or cannot be effected prudently, the necessary expenses incurred in moving the vessel to the port of repair are considered to be part of the cost of repair: if, after repairs, she forthwith returns to the port from which she was removed, the necessary expenses incurred in returning are also allowed; but, if she loads a fresh cargo at the port of repair instead of so returning, then no expenses subsequent to the completion of repairs are allowed. Any new freight earned or expenses saved in relation of the current voyage of the vessel are to be deducted from the expense of removal. Ordinary expenses in fulfilment of a contract of affreightment are not admitted, although such expenses are increased by the removal to a port of repair. (Rule of Practice of the Association of Average Adjusters, "*Expenses of removing a vessel for repair*").

It has been already mentioned that underwriters are not liable for damage by wear and tear. It may also be added that they are not liable for loss or damage which has arisen in consequence of any part of a vessel's equipment being ordinarily used for the purpose for which it was intended, nor are they liable for any gear improperly carried in insecure places. It may be useful if the customs of Lloyd's in this connection are here enumerated. They are three in number and are as follows, viz:—

i. Sails split by the wind or blown away while set are not charged to underwriters unless the loss be occasioned by the ship's grounding or coming into collision, or in consequence of damage to the spars to which the sails are bent.

ii. Rigging injured by straining or chafing is not charged to underwriters unless such injury be caused by blows of the sea, grounding or contact, or by displacement through sea peril of the spars, channels, bulwarks or rails.

iii. Damage or loss of water casks or tanks carried on a ship's deck is not paid for by underwriters, nor is that of warps, or other articles when improperly carried on deck.

An underwriter on ship is not charged with wages of crew during repairs, except, of course, if any members of the crew are specially retained to do work which would otherwise have necessitated the employment of outside labour, in which case the wages of the men so retained would be allowed.

If a vessel be at a port where it is deemed prudent, with a view to economy, to effect only temporary repairs, the permanent repairs to be effected subsequently at some other port, then the underwriter is liable for the reasonable cost of both temporary and permanent repairs.

PARTICULAR AVERAGE ON FREIGHT.

Let us now consider Particular Average on Freight. Freight, as is well known, is money payable either for the hire of a vessel or for the conveyance of cargo from one port to another. It will therefore be apparent that freight of itself is not capable of sustaining actual, *i.e.*, physical depreciation by perils insured against in the same way as a ship or goods. To constitute a particular average on freight, therefore, there must be a partial loss in respect of it. It is impossible, in the space of handbook, to deal with the technical questions which have arisen and may arise in connection with losses of freight, and especially in connection with chartered freights, and I must content myself with giving an example of a simple particular average on freight. Suppose a cargo of sugar is shipped, say, from Demarara to London, no part of the freight being prepaid, and during the voyage, and owing to a peril insured against, one-third of the sugar melts. There is clearly a loss of one-third of the freight, and the underwriter would, subject to the terms of the policy, be liable for one-third of the amount for which the freight was insured.

The measure of underwriters' liability is based on the valuation of the freight in the policy. If, however, with a vessel at her loading port, only part of the cargo to which the valuation of freight was intended to apply is on board or actually contracted for at the time when the loss occurs, then the underwriter is only liable to pay on such proportion of the amount insured as the part of the cargo actually on board or contracted for at the time of the loss bears to the whole of the cargo which it was intended to ship. (Arnold on Marine Insurance, VII. Ed. § 1041).

It is important to remember that in order to give rise to a claim under a policy on freight, the loss must, as in all other cases, have been caused by a peril insured against. A point to be noted is that English law recognises no payment of freight for a partial performance of the voyage, known as *pro ratâ* or "distance" freight. If, owing to perils of the sea, the shipowner is prevented from delivering the cargo at the port of destination, he cannot require the merchant to pay anything for the portion of the voyage which the vessel has performed. In this respect English law differs from those of most, if not all, foreign nations, which recognise the payment of what is called "distance" freight, *pro rata itineris peracti* (proportionate to the mileage of the voyage actually performed), and in some cases even full freight.

Nowadays it has become the custom for shipowners to demand payment of freight in advance. When freight is so paid in advance, the shipowner has no longer an insurable interest in it, as he runs no risk of losing it, for he cannot be called upon to refund any portion of it whether the voyage be completed or not. It is therefore at the risk of the merchant or charterer who has had to pay it, and who would be the loser if the vessel were lost, and the insurable interest consequently rests in them, and they can, therefore, insure it accordingly as advanced freight, or include it in the value of the goods.

When a merchant insures his goods, and includes in the invaluation (as he usually does) the amount of freight which he

has paid in advance, the fact of this inclusion should as a general rule appear on the face of the policy, the frequently used wording being "On Goods, including advanced freight, valued at £ ," or "On Goods, valued at £ (including £ advanced freight)." It has been decided by our Courts that in such a case, whether the amount of the advanced freight is specified in the policy or not, the policy is to be treated as a policy on valued "goods" and not as a separate insurance on advanced freight. In case of loss of, or damage to cargo, therefore, the valuation (including the amount of advanced freight) is the basis for calculating the amount of the underwriter's liability. (*Thames & Mersey Marine Insurance Co., v. Pitts Sons, & King*, 1893, VII. Asp. 302.)

PARTICULAR AVERAGE ON CARGO.

A claim for particular average on cargo arises when the cargo has been either partially damaged by a peril insured against, or a portion of the cargo has been totally lost. If, for example, of a shipment of say 100 bales wool, 25 of them arrive at their destination depreciated by sea-water to the extent of 20 per cent.; or 5 of them arrive totally worthless; or the whole 100 bales arrive depreciated to the extent of 90 per cent. or perhaps even 99 per cent.; in all these cases the claim is for particular average. Merchants sometimes seem to be under the impression that if their cargo arrives damaged, the underwriter ought to pay them the difference between the insured value of the goods, and the net amount which they realise by sale, thereby involving an underwriter in the effect of a rise or fall of the market, a matter which does not concern him (*Lewis v. Rucker*, 2 Burr, 1167). The kind of settlement which I have just referred to is termed a "salvage loss," and can only arise when cargo is necessarily sold short of its destination. This point has already been dealt

with when considering constructive total loss of cargo. When cargo has arrived at its destination, the claim on the underwriter is on the basis of particular average, which will be directly explained.

If the cargo arrive at its destination unidentifiable owing to obliteration of marks by perils insured against, so that it cannot be delivered to consignees, such a contingency does not render an underwriter liable for a total loss, as the cargo has in fact arrived, but the value can only be ascertained when the proceeds of the whole of the unidentifiable cargo have been duly apportioned amongst the claimants entitled thereto. (*Spence v. Union Marine Insurance Co.*, L.R. 3 C.P. 427), and any damage to the cargo by perils insured against should in such a case be treated as particular average.

Now let us consider how the depreciation of damaged cargo is to be ascertained. Sometimes it is assessed by brokers who issue certificates stating the nature of the damage, and certifying as to the value which the goods would have possessed had they arrived in sound condition, and also certifying to their values in their damaged state. Or sometimes the depreciation is expressed as so much per cent. But a frequent method of ascertainment is by resort to public auction.

When the sound and damaged values have been ascertained, the depreciation has to be arrived at by a comparison of the gross (*not net*) sound value with the gross proceeds. (*Johnson v. Sheddon*, 2 East, 581). This shows the amount of the loss, which is usually shewn as so much per cent. on the sound value.

The reason for comparing gross values instead of net values is that, if net proceeds were adopted, the percentage of depreciation would be affected by reason of the fact that, the charges deducted to ascertain the net values being exactly the same whether the goods be sound or damaged, market fluctuations would become a factor in the loss.

Let us take an example:—

GROSS VALUES.		NET VALUES.	
		Sound Value ..	£100
		Less Charges ..	10
Gross Sound Value ..	£100	*Net* Sound Value ..	£90
		Proceeds ..	£50
		Less Charges ..	10
Gross Proceeds	50	*Net* Proceeds	40
Loss	£50	Loss again ..	£50
Depreciation 50 per cent.		But the *depreciation* on a Sound Value of £90 is 55½ per cent.	

And now comes in a fundamental difference between the treatment of claims for particular average on ship and particular average on cargo. It will be remembered that the reasonable cost of repairs to a vessel is paid for by underwriters without regard to the insured value, provided such cost does not exceed the policy valuation. But in the case of cargo, the percentage of depreciation, ascertained in the manner just explained, is always applied to the insured value to arrive at the amount of the liability of the underwriter. If the insured value is less than the gross sound value, then the underwriter pays proportionately less of the loss. But if the insured value is more than the gross sound value, then the underwriter pays proportionately more. The merchant receives less or more than the loss which he has actually sustained, as the case may be.

For example:—

A sea-damaged bale of wool, gross sound value .. £10
,, proceeds .. 5
Loss £5

or 50 per cent.

If the insured value is £8 the underwriter is liable for 50 per cent. of it, or £4.

Or if the insured value is £12 the underwriter is again liable for 50 per cent. of it, or £6.

This principle of applying the percentage of loss to the insured value was laid down in the celebrated case of *Lewis v. Rucker* (2 Burr. 1167), as long ago as 1761. By its adoption the underwriter is unaffected by any fluctuations of the market—a matter with which, as already observed, he has no concern, and the principle of comparing gross sound value with gross proceeds was laid down in an equally well known case, *Johnson v. Sheddon* (2 East. 581), in 1802.

Some articles such as Tobacco, Wool and Hides, &c., gain in weight in consequence of absorption of sea water. In such cases the underwriter must not be prejudiced thereby, so any increase has to be deducted when calculating the sound value. Whether or not an increase in weight has occurred is ascertained by means of a proportion sum, as follows:—If the sound bales weighed, say, 2,000-lbs. per invoice and delivered, say, 2,200-lbs. per landing weights, then the damaged bale which weighed, say, 180-lbs. per invoice should deliver in proportion 198-lbs.; and if this weight so ascertained is less than the landing weight, the difference between the two shews the increase in weight by water. In the case of wool if the actual increase cannot be ascertained, it is taken at 3 per cent. In the case of tobacco which has been cut off from the original bale, the allowance for water in the cuttings is one-fourth.

In the case of some articles, cotton, for example, it is often expedient to pick off the damaged cotton, leaving the so plucked bale for sale as in sound condition. The loss ascertained in this manner is called a "Pickings Claim." Similarly with coffee: the damaged bag is "skimmed," *i.e.*, the damaged berries are removed, and the loss is called a "Skimmings Claim." The losses ascertained in this way are by common usage paid by underwriters irrespective of percentage.

Next let us deal with the ascertainment of the insured value. If the value is specified in the policy, as for example 100 bales

of wool insured for £1000 and valued in the policy at £10 per bale, the insured value of each bale is fixed and apparent. But suppose the policy is on 100 bales wool valued at £1000 including freight advanced (freight advanced becoming merged in the value of the goods, as previously mentioned), how is the insured value of any particular damaged bale or bales to be ascertained? As a rule this is done by a comparison of invoice values on the basis of a rule-of-three sum. If the total invoice value of the whole shipment be insured for so much, then the invoice value of the damaged bale, case or bag, or whatever it may be, will be insured in proportion for so much. But if the invoice for any reason is not available for the computation of the insured value, then calculations on the same principle are based on the account sales on the basis of sound values.

When the liability of the underwriter has been ascertained by applying the percentage of depreciation to the insured value, there must then be added to the amount so ascertained any extra charges incurred in consequence of the damage, including the fee for survey. These are allowed so far as they have been incurred in connection with goods which are so damaged as to give rise to a claim under the policy; but the underwriter is not liable for any such charges so far as they relate to goods found to be in sound condition, or to damage which does not give rise to a claim under the policy. *(Vide p.* 68 *infra.)*

In event of a particular average claim arising owing to an absolute total loss of part of the interest insured, *e.g.*, as a barrel or bags of sugar "washed out," the amount of the underwriter's liability is the insured value of the portion lost ascertained in the manner already described.

CHAPTER VI.

THE "*MEMORANDUM.*"

We will next proceed to consider the "Memorandum," as it is called. It reads as follows, viz. :—

> *N.B.—Corn, Fish, Salt, Fruit, Flour and Seed, are warranted free from average, unless general, or the ship be stranded; Sugar, Tobacco, Hemp, Flax, Hides and Skins, are warranted free from average under Five Pounds per cent.; and all other goods, also the ship and freight are warranted free from average under Three Pounds per cent., unless general or the ship be stranded.*

The Memorandum was introduced into the policy in 1749, and, as is apparent, it provides a minimum limit to the underwriters liability in respect of claims for particular average by exempting him from such claims, either absolutely or under certain percentages, unless the ship be "stranded"; and it has become usual nowadays to add "sunk or burnt," and sometimes also the words "or on fire, or the damage be caused by collision with another ship or vessel." With regard to the stipulated "percentages," they are not to be confused with the so-called "franchises" which prevail in continental insurances. If the damage amounts to or exceeds the stipulated percentage, the underwriter pays the whole of the damage—not solely the excess of the percentage, as would happen in the case of a so-called "franchise."

The articles enumerated in the Memorandum are to be understood in their mercantile sense. The word "corn" includes peas and beans, and malt, but it does not include rice (*Scott v. Bourdillon*, 2 B. & P. (N.R.) 213). "Salt" does not include saltpetre or chemical salts. "Flour" covers barley meal but not sago flour. "Hemp" and "Flax" do not cover jute.

The word "average" in the phrase "average unless general," means particular average.

In order to ascertain whether or not the memorandum percentages have been reached, regard can only be had to particular average—depreciation or loss of part—of the subject matter of the insurance. It follows, therefore, that neither general average (*Price v. A1 Ships Small Damage Association*, 1889, VI. Asp. M.L.C. 435), nor extra charges incurred in order to substantiate a claim such as survey fees, cost of protest, &c., are to be added to the loss in order to make up the required percentage; but these extra charges are payable by underwriters provided the percentage has been reached.

With regard to what are technically known as Particular Charges—sometimes called Special Charges—charges which are incurred solely in connection with the particular interest to which they relate, they may be, firstly, "expenses incurred by the assured or his agent in preserving or recovering the subject insured from loss by the perils insured against," (McArthur, Contract of Marine Insurance, II. Ed. 261) Such charges are recoverable from underwriters under the "sue and labour" clause, which has already been dealt with (*p.* 35 *supra*). It will doubtless be remembered that expenditure under this clause must be made with a view to averting or minimising a loss for which the underwriter is liable. Secondly, Particular or Special Charges may be recoverable from underwriters, apart from the "sue and labour" clause, as a loss caused by a peril insured against when they have been necessarily incurred in consequence of such a peril, *e.g.*, expenses of warehousing and forwarding cargo when a peril insured against has occasioned the necessity of such expenditure (Arnold on Marine Insurance, VII. Ed. § 869).

Particular charges incurred at a port of refuge cannot be added to the amount of damage sustained to ascertain whether the memorandum percentage has been reached or not. (*Kidston v. Empire Marine Insurance Co., Ltd.*, 1866, L.R. 2 C.P. 557).

It would seem that if the insured value of the thing insured is less than its actual value, then the underwriter pays only a proportionate part of such charges; otherwise he pays them in full.

As an example of Particular Charges incurred at a port of refuge, let us imagine a shipment of skins, warranted free from particular average, under 5 per cent. The vessel, having put into a port of refuge in consequence of heavy weather, the skins are found damaged by sea water, and by incurring an expenditure of 2 per cent, the damage is arrested, and only amounts on arrival at port of destination to 4 per cent. The underwriter is liable for the expenses (2 per cent.) under the "sue and labour" clause, but he is not liable for the particular average (4 per cent.) although the charges and the particular average together (amounting to 6 per cent.) exceed the stipulated percentage of 5 per cent. (*Kidston v. Empire Marine Insurance Co., Ltd.*, 1866, L.R. 2 C.P. 357.)

Particular charges incurred at the port of destination to re-condition goods which have arrived damaged by a peril insured against, and in respect of which there is a right of recovery under the policy, are paid by underwriters when the particular average itself amounts to the required percentage; or when the charges come within the terms of the "sue and labour" clause. When they are so recoverable, the amount which the underwriter pays is the full actual expenditure, even though the insured value be less than the sound value.

The question will doubtless suggest itself whether successive losses happening at different times during the voyage, each one of itself being under the requisite percentage, may be added together in order to render the underwriter liable. So far as concerns insurances on hull, &c., for voyage, and cargo and freight for "voyage," this can undoubtedly be done, for the place of ascertaining the damage is the end of the voyage. With regard to insurances on hull, &c., for "time," however, it has been decided that in order to ascertain whether the 3 per cent. had been

reached, the shipowner can add together the losses occurring on one round voyage only, and not losses occurring during the whole currency of the policy. (*Stewart v. Merchants Marine Insurance Company*, 1885, V. Asp. M.L.C. 506). The clauses of the Institute of London Underwriters provide for this in special terms, and specify what is to be actually understood as one voyage.

AVERAGE CLAUSES, SERIES, AND SEPARATE VALUATIONS.

Let us now turn our attention to the question of average clauses, series, and separate valuations. As vessels increased in size and cargoes in magnitude, it was found that although the percentages mentioned in the memorandum were comparatively low in themselves, yet in cases of vessels and cargoes of high values the loss would have to be considerable in amount in order to enable the assured to recover under the policy, unless, of course, the vessel had been "stranded, sunk or burnt." For instance in the case of a vessel valued at say £100,000 no claim under £3,000 would be recoverable, and so with cargo of one commodity and comprised in one valuation. In order to alleviate the apparent severity of the memorandum in this respect there were gradually introduced into policies on hulls, etc., of vessels separate valuations for the "hull," "machinery," "fittings," &c., and a proviso—"Average payable on each valuation separately or on the whole." Likewise the so termed "average clauses" were introduced into policies on cargo. The effect of these average clauses is that in ascertaining whether the memorandum percentage had been reached, the cargo should be considered as subdivided into smaller divisions, each of these subdivisions being known as "series," and if the damage amounted to the necessary percentage on a series, then the loss should in respect of such series be recoverable.

The idea originally underlying the introduction of "series" was apparently to subdivide the cargo for purposes of memorandum percentages, into lots of roughly about £100 value, but now-a-days, under the stress of competition, the original idea seems to

have been lost sight of. Of course, if the particular average exceeds the required percentage on the whole interest, the average clause does not come into operation. The average clause varies according to the subject-matter of the insurance. Cotton, for example, pays average on each 10 bales; tea on each 10 chests, 20 half-chests or 40 boxes; wool from Australia on each bale; indigo on each package; cocoa 25 bags; and so forth.

The average clause usually stipulates that the "series" shall be computed on the basis of "following landing numbers," *i.e.*, the order in which they are landed. It is a general practice, however, in landing cargo to set aside, in the case of a large shipment or mark, all the damaged packages and land them last, their numbers appearing all together at the end of the dock landing account. At first sight this procedure may seem to inflict a hardship on the underwriter as regards the computation of "series;" but, on the other hand, one must not overlook the spread of damage which would probably ensue in consequence, for example, of a bag of rice wet with sea-water being in close contact with sound bags in the same sling.

Now it may happen that the number of packages in a shipment does not lend itself to division into a complete set of series. For example, a shipment of 53 bags cocoa, average on each 25 bags, can be divided into 2 series of 25 bags each. But how about the remaining 3 bags? That is called a "tail" series, and the practice is to allow claims for particular average on this "tail" series provided the average amounts to the required percentage on its value. So in the example mentioned, if the damage amounted to 3 per cent. on the last 3 bags cocoa, the loss would then be recoverable under the policy, though less than the stipulated 3 per cent. on a series of 25 bags.

"UNLESS GENERAL."

With regard to the words "unless general" in the Memorandum, these words are not to be read as meaning that if a general

average has occurred the stipulations of the memorandum are to be inapplicable. It would be better to substitute the word "except for" for "unless," which makes the meaning clearer. The memorandum would then conclude "and all other goods, also the ship and freight are warranted free from average under Three Pounds per cent., except for general average, or unless the ship be stranded."

STRANDING.

Having noticed the stipulations in the Memorandum, we must now pass on to those accidents which render its terms inoperative. If there is a "stranding" of the vessel, the underwriter has to pay particular average irrespective of the minimum percentage—moreover, whether or not the damage is attributable to the stranding is to be beside the question. If a steamer strands, and gets off without a spoonful of water having entered her hold, and previously or subsequently meets with violent weather which causes damage to her cargo, the underwriter is liable for the whole of the damage sustained, though none of it was caused by the stranding.

It is, therefore, important to ascertain as exactly as may be what constitutes a stranding. A vessel is stranded within the meaning of the Memorandum, when, in consequence of some accidental or unusual occurrence, she comes in contact with the ground or other obstruction, and remains hard and fast upon it. It may be on the sea shore, it may be on rocks, on a heap of rubbish, on piles which have been driven into the harbour bed.

There are two important features, however, which are necessary in order to constitute a stranding:—

Firstly, the grounding must have been accidental. If the taking of the ground was in an accustomed place and manner, as for instance, in a tidal harbour, then there is no stranding. If the ground be taken in an unusual place, and in an unusual manner, and accidentally, then there is a stranding.

Secondly, in order to constitute a stranding, there must have been an actual remaining fast upon the obstruction, and not a

mere "touch and go." A mere striking of the ground will not be sufficient (*McDougall v. Royal Exchange Assurance Corporation*, 4 M. & S. 503), however violent the striking may be; nor will merely a temporary retardation of her way constitute a stranding. Nor will it be a strand if the vessel drags through the mud or bumps over a bar. No definite period of time can be fixed during which it is necessary for the vessel to have remained hard and fast. But she must have actually remained fast during a period of time which has never yet been judicially determined, although a minute and a half was in the above case held insufficient to constitute a stranding.

"SUNK."

It has already been mentioned that the words "sunk or burnt" are usually added to the word "stranded." The word "sunk" is really a surplusage, because every ship which is "sunk" is *ipso facto* "stranded." One would hardly have supposed that the term "sunk" would have left any room as to the meaning to be attached to it. But it was brought before the Court in the case of *Bryant & May v. London Assurance Corporation* (1886, 2 T.L.R. 591). A vessel was carrying a cargo of match splints from Quebec to London, and arrived in the Thames with water over her deck as far aft as the mainmast; abaft the mainmast it was dry, and so was the captain's cabin and hurricane deck. The cargo was considerably wetted, though a portion of it was discharged in a dry condition. The assured contended that the vessel had been sunk within the meaning of the term, inasmuch as she had sunk as far as she could in view of the nature of her cargo. It was admitted at the trial, however, that had the cargo become more saturated with water, the vessel would have sunk further down in the water. Mr. Justice Grove decided that this was not a sinking within the meaning of the term.

"BURNT."

With regard to the exception "burnt," it should be carefully noted in the first place that it is necessary to consider whether

the circumstances are such as to justify the vessel being regarded as technically "burnt." It was formerly thought that if the ship herself was on fire, however slight the fire might be, such as the burning of a beam, for example, that was sufficient to come within the Memorandum exception. But this idea was dispelled by the judgment in the case of the "*Glenlivet*" (1893, VII. Asp. M.L.C. 395), which decided that the burning must be of such an extent that a jury would find that the vessel must be considered a burnt ship. It was in consequence of this decision that the words "or on fire" are sometimes inserted after, or substituted for, the word "burnt," as previously mentioned, with the object of mitigating the strictness of this exception.

"OR IN COLLISION."

Further there is sometimes added to the memorandum, after the word "burnt," or "on fire," as the case may be, the words "or in collision." When that addition is made, it should be noted that the collision refers to a collision with another ship or vessel only, and not with dock gates and the like. (*Richardson v. Burrows*, Q.B. 16th Dec. 1880). It would also seem to follow from the decision in the case of *Chandler v. Blogg*, (1897, III. Com. Cas. 18), that contact with a vessel which has just been run down and sunk, is a "collision" within the meaning of the term.

CHAPTER VII.

GENERAL AVERAGE.

At the outset, it must be clearly understood that the right to General Average compensation and liability for General Average contribution are matters absolutely and entirely independent of marine insurance. General Average formed part of the Rhodian law, and was in existence centuries before Marine Insurance was introduced. In considering the subject of General Average, therefore, let us for the present dismiss from our minds altogether the question of insurance.

DEFINITION.

General average is an extraordinary loss or expenditure voluntarily and deliberately incurred in a moment of peril for the common safety, and such loss or expenditure must be contributed to proportionately by all parties concerned in the adventure.

A definition of general average was given by Mr. Justice Lawrence in the case of *Birkley v. Presgrave* I. East 220), which has become renowned in consequence of the number of times which it has been quoted in our Courts. The definition is as follows, viz. :—"All loss which arises in consequence of extraordinary sacrifices made, or expenses incurred, for the preservation of the ship and cargo, comes within general average, and must be borne proportionately by all who are interested."

In a more recent case (*Anderson v. Ocean S.S. Co.*, 10 App. Cas. 107 at p. 114), Lord Blackburn said :—"General average is founded on the Rhodian law, which, however, in terms did not extend further than to cases of jettison, but its principle applies, and has been applied, to all other cases of voluntary sacrifice for the benefit of all, that is, if properly made."

Wilde, C. J., in the case of *Hallett v. Wigram*, (9 C.B. 580), said:—"The claim for general average arises where a part of a cargo or a ship is destroyed in order to rescue the remainder from some impending peril."

"What is given or sacrificed in time of danger, for the sake of all, is to be replaced by a general contribution on the part of all who have been thereby brought to safety." (Lowndes on General Average, IV. Ed. p. 1).

The losses which give rise to general average contribution come under two heads:—

i. Sacrifices of property.

ii. Expenditure.

Before proceeding to consider these subjects, it will be well if we glance at the

ESSENTIAL FEATURES,

which must be present in order that a loss may give rise to general average contribution.

First of all, *The loss must be voluntary*, or, in other words, it must be the intentional act on the part of man as opposed to an accidental loss by maritime peril.

Secondly: *It must be properly made.* If it is a case of sacrifice, then it must be an act done prudently. If it is expenditure, then it must be fair and reasonable, and it is only allowable in general average so far as these essentials are complied with.

Thirdly: *It must be extraordinary in its nature*, and not one which is necessarily involved in performance of affreightment, as we shall presently see.

Fourthly: *The object of the sacrifice or expenditure must be nothing other or less than the common safety of ship and cargo*, not for the safety of the ship alone, or of the cargo alone, and not merely for the completion of the adventure. There must be imminent danger, and the object must be the attainment of safety.

This principle, apparently, differs from the laws of most foreign countries, which recognise either the "completion of the adventure," or else the "general benefit," as being the object which justifies a general average act.

Fifthly: *The loss must be the direct result or reasonably the consequence of the act causing it.* For instance, in the case of jettison, if water gets below during the act of jettison, the damage caused to cargo by the water is allowable in general average equally with the value of the cargo jettisoned, the reason being that the risk of incurring such damage, or the likelihood of its happening, would have been present in the minds of those who resolved to make the primary sacrifice.

In the words of the late Richard Lowndes in his renowned treatise on The Law of General Average (IV. Ed. p. 36):— "Since giving must always imply an intention to give, what we have to here ascertain must be, what loss at once has in fact occurred, and likewise must be regarded as the material and reasonable result of the act of sacrifice; or, in other words, what the shipmaster would naturally, or might reasonably, have intended to give for all when he resolved upon the act. If, then, upon the act of sacrifice any loss ensues which the master did not in fact bring before his mind at the time of making the sacrifice, it would have to be considered whether it were such a loss as he naturally might, or reasonably ought, to have taken account of."

SACRIFICES.

SACRIFICES OF SHIP.

In considering sacrifices of ship's materials, *e.g.*, such as cutting away a mast, or slipping an anchor, it is always necessary to carefully bear in mind that no loss or damage to the vessel

or her appurtenances, arising from employment in the ordinary and intended manner, is allowable in general average, even though the employment be excessive. For example, injury to pumps, or donkey engines, in consequence of excessive use, (*Harrison v. Bank of Australasia*, 1872, 1 Asp. M.L.C. 198), or damage to spars or canvas by crowding on all sail to escape an enemy (*Covington v. Roberts*, 2 B. and P.N. R. 378). If, however, the master voluntarily destroys any part of the ship, or puts any of her appurtenances or appliances to a use for which they were not intended, at the risk of destroying or injuring them, any loss or damage thus caused for the common safety in time of peril is to be made good by general contribution; as for example, using a sail in connection with stopping a leak, or to cover up a hatch broken by shipping a sea in a storm. As examples of sacrifices of ship, let me instance the cutting away of masts, spars and sails, when the vessel is on her beam ends in order to right her; damage to a steamer's propeller and shafting, owing to the working of her engines whilst aground in a position of danger; coals consumed whilst the engines are being so worked; the scuttling of a vessel in order to admit water to extinguish a fire; and so forth.

AMOUNT TO BE MADE GOOD (SHIP).

The amount to be allowed in general average in respect of sacrifice of any part of the vessel, or her machinery, is measured by the reasonable cost of repairs, less (if any) the usual deductions "new for old." If repairs have not yet been effected when the adjustment is prepared, the amount allowed in general average is necessarily based on estimate, and the estimate, less any deductions referred to, is the measure of compensation, provided that if the vessel be sold unrepaired, such compensation is not greater than the depreciation in the value of the vessel by reason of the sacrifice alone as ascertained by the sale.

So far we have been dealing with what are known as "sacrifices of ship," which have not been complicated by other

considerations. But let us now suppose an extreme case where particular average damage is followed by a general average sacrifice, resulting conjointly in the condemnation of the vessel. For example, a vessel during the voyage meets with violent weather whereby she is seriously damaged; subsequently, she gets into another storm, and, whilst on her beam ends, the master cuts away her masts and gear in order to right her. On her arrival at a port of refuge she is condemned and sold. In such circumstances, how is the amount to be allowed in general average to be arrived at? This question came before the Courts in the case of *Henderson v. Shankland* (1896, I. Com. Cas. 333), and it was decided that the method to be adopted is to deduct from the value of the vessel the estimated cost of repairing the particular average damage. This would give the value of the vessel immediately preceding the general average sacrifice, and the difference between that value and the sum realised by the sale is the amount of the general average sacrifice.

Let me give you some imaginary figures to render my meaning clearer:—

Suppose the sound value of the vessel to be	£10,000
Deduct estimated cost of repairing particular average damage	7,500
Value of vessel immediately preceding general average sacrifice	£2,500
Amount realised by sale of vessel ..	200
Amount to be made good in general average in respect of sacrifices	£2,300

SACRIFICES OF CARGO AND FREIGHT.

Jettison provides one of the simplest forms of general average sacrifice. Jettison has been defined (Phillips on Insurance, V. Ed. § 1278) as "the throwing overboard a part of the cargo, or any article on board of a ship, or the cutting or casting away of

masts, spars, rigging, sails, or other furniture, for the purpose of lightening or relieving the ship, in case of necessity or emergency." But in speaking of jettison we ordinarily understand the throwing overboard of part of the ship's cargo. The first reported case concerning jettison is Mouse's case in the reign of James I. In that case certain jettisons had been made by passengers on a ferry-boat in case of danger in order to save their lives, and this was held to be a lawful jettison, and that, inasmuch as the ferry-boat had not been overladen and the loss had not been caused by any fault of the ferryman, there should therefore be contribution from all towards the loss.

With regard to cargo carried on deck, if it is jettisoned, the loss is not made good by contribution unless there is a general custom of trade, *e.g.*, the timber trade, to carry cargo on deck. In the absence of any such custom, the loss by jettison of deck load must fall on the owner of the deck load if he has agreed with the shipowner to that method of carriage or stowage; otherwise it falls on the shipowner. And in either of the latter events the loss of freight involved by the jettison falls solely on the shipowner.

Damage by water used to extinguish a fire is allowed in general average (*Stewart v. West Indian & Pacific S. S. Co.* 1873, II. Asp., M.L.C., 32). But if the package damaged by the water was itself on fire when the water is poured upon it, no allowance in general average is to be made. For this reason great care has to be taken in surveying cargo which has been landed from a vessel on which a fire has occurred to differentiate between fire damage and exclusively water damage.

Among other general average sacrifices of cargo which give rise to contribution may be mentioned cargo burnt for fuel when the coal supply has run short, always provided that the original supply was sufficient.

When a sacrifice of cargo (*e.g.*, by jettison) also involves a loss of freight, it follows that the freight so sacrificed is likewise made good in general average.

AMOUNT TO BE MADE GOOD (CARGO).

Let us now consider how the amount to be allowed in general average for sacrifice of cargo is to be computed. In the event of goods having been lost by jettison, or otherwise sacrificed, the amount to be allowed in general average is the net value which they would have had on the day of discharge at the port where the adventure terminates, deducting therefrom those charges which would have been incurred had the goods arrived instead of having been lost, *e.g.*, freight, discount, duty, landing and sale charges. If, however, the goods remaining on the vessel arrive at the port of destination in a damaged condition, owing to causes which would have equally affected the jettisoned goods had they remained on board instead of having been thrown overboard—I refer to particular average damage—the allowance in general average is to be based on what the goods would have realised had they arrived at destination in a damaged condition similar to the other cargo. In the case of damage to goods, the amount to be allowed is ascertained by a comparison of their net proceeds with what they would have produced net had they been sound. And if the goods are subject to leakage in the ordinary way, such as casks of oil or wine, the ordinary leakage must be deducted in ascertaining the value to be admitted for general average contribution. The same remark equally applies to ordinary deficiency or breakages.

AMOUNT TO BE MADE GOOD (FREIGHT).

With regard to the amount to be allowed in general average in respect of a sacrifice of freight at the risk of the shipowner—the amount of prepaid, or advanced freight, is included in the value of the goods—it is the gross freight which would have been earned had not the goods been sacrificed, less those charges (if any), which would have been incurred by the shipowner to earn such freight, but which he has, in consequence of the sacrifice, not incurred. If, after the sacrifice, any substituted cargo has been shipped on the same voyage at a port

of call to fill the place of that jettisoned, any freight which may be earned in respect of that substituted cargo, less the expenses incidental to earning it, must be credited to the freight which has been sacrificed.

EXPENDITURE.

All extraordinary expenditure properly incurred in time of danger for this joint preservation of this common adventure is the subject of general average contribution.

One of the most common cases of general average expenditure is where a vessel puts into a port of refuge for the common safety, incurring inward port charges, pilotage, harbour dues, &c. It may be also found necessary to discharge the cargo to effect repairs, and then there are the expenses of leaving the port of refuge to resume the voyage. Possibly, also, shore-labour may be engaged to work the pumps if the ship be leaking.

Now there may be two reasons which necessitate putting into a port of refuge: one reason may be on account of general average sacrifice, *e.g.*, breakage of propeller blades and damage to machinery caused by working engines to get a stranded steamer off; or masts cut away to right a ship. The other reason may be on account of particular average damage, *e.g.*, propeller blades broken, or the breakage of a shaft, through the propeller coming in contact with floating wreckage, or the like; or the dismasting of a vessel in a gale. And it is essential to ascertain which reason necessitated the putting into port, as this furnishes the test as to how the expenditure is to be treated according to the law of England, each case having to be treated on its merits.

According to English law, if a vessel puts into a port of refuge in consequence of damage, which is the subject of general average, the cost of entering the port of refuge; of discharging the cargo for repairs, if necessary; of warehousing the cargo whilst repairs are being effected; of reloading the cargo; and of

leaving the port are all treated as general average, because all this expenditure is the consequence of a general average act. (*Attwood v. Sellar*, 1880, IV. Asp., M.L.C. 283).

If, however, the reason for putting into port for the common safety is consequent on particular average damage, then according to English law the cost of entering the port and, if necessary, of discharging the cargo and putting it into warehouse or store, in order to effect repairs, is general average, and here general average ceases, inasmuch as physical safety has been attained. Consequently, the warehouse rent of the cargo is a particular charge on the cargo; and the cost of reloading and outward port charges, a particular charge on freight. (*Svendsen v. Wallace*, 1885, V. Asp., M.L.C. 453).

These distinctions, which seem rather subtle, are, as has been particularly mentioned, according to the law of England. The York-Antwerp Rules (*vide p.* 108 *infra*) and the laws of most foreign countries recognise no such distinction, and they treat the whole expense as general average irrespective of the cause or motive which necessitated the putting into the port of refuge. This divergence arises in consequence of the difference between English and Continental laws as to the object which prompted the general average act, English law recognising, as I have already pointed out, "the attainment of safety," whereas Continental laws apparently recognise "completion of the adventure," or "general benefit."

Where assistance is engaged by the master for the joint benefit, *e.g.*, safety of ship and cargo, the amount paid for such assistance is the subject of general average contribution. For instance, if a steamer breaks her shaft and the master engages a tug or another steamer to tow her to port for a lump sum, the amount so paid is treated as general average.

COMPLEX SALVAGE OPERATIONS.

Suppose a ship with her cargo has been stranded or sunk, and has been brought into safety by a series of connected though distinct operations; for example, the first operation being

discharging and landing the cargo, the second being attempts to tow the vessel off the strand which, in the event of failure, is followed by the third operation of digging out a channel to facilitate the re-floating. In such circumstances the question arises, "How is it to be determined whether the entire cost of those operations, from their commencement to their termination should be allowed in general average, or whether it should be charged specifically to the property saved by each specific stage in the operations?" The answer to this question is obtained, to use an Irishism, by putting a further question:—"What was the principal motive which, from the facts, may be reasonably presumed to have induced the incurring of the expenditure?" If that motive was to save the cargo alone as opposed to the ship alone, or *vice-versa*, then the expense must fall on the ship or the cargo as the case may be. But if the principal motive of the expenditure was the joint preservation of the ship and cargo, then the expenditure is to be allowed in general average (Lowndes on General Average, IV. Ed. p. 174, *et supra*. Cf. *Job v. Langton*, 6 E. & B., 779; *Moran v. Jones*, 7 E. & B., 523; and *Walthew v. Mavrojani*, L.R.S. Ex., 116).

For example, where specie had been safely landed from a stranded vessel, and after it had been so landed, cargo was jettisoned, and tugs employed to tow the vessel off, it was decided that the specie was not liable to contribute either to the jettison or to the expenses of re-floating the vessel as they were not incurred for the safety of the specie. (*Royal Mail Steam Ship Company v. English Bank of Rio de Janeiro*, 19, Q.B.D., 162). On the other hand, it has been held that the cost of discharging cargo and getting a ship off a bank were all general average when they formed part of what must be deemed one continuous operation for the benefit of ship, freight and cargo. (*Moran v. Jones*, 7, E. & B. 523).

There is one very important limitation to the liability of cargo for contribution to general average in cases of complex salvage operations, which was laid down in the case of *Kemp v. Halliday*

(6, B. & S., 723). That case decides, as is tersely put by Lowndes, Law of General Average, IV. Ed., p. 261, that:— "When a ship with her cargo on board has been sunk, if the cargo can be more easily and cheaply saved by itself than conjointly with the ship, the cargo cannot be required to pay, as its share of contribution towards a conjoint salvage, a larger sum than would have been the cost of saving it separately." The case of the specie landed from a stranded vessel, just referred to, is an instance where this principle would be applied. It might happen that the specie could be carried ashore by incurring little expense, whereas the saving of the ship and cargo after the specie was landed would be a costly operation. In such circumstances the limit of the liability of the specie would be the cost of saving it by itself.

There can be no question as to the amount to be allowed in general average in the case of general average expenditure, *e.g.*, towage to a port of refuge. It is the amount of the expenditure itself.

SUBSTITUTED EXPENSES.

When a vessel is at a port of refuge in a damaged condition, it may be possible, by adopting an alternative course, to avoid the expense which would be entailed by repairing her there. For instance, suppose a vessel is at a port of refuge where, in order to repair her, it would be necessary to discharge the whole of her cargo, warehouse it, and subsequently reload it. It might be possible, as an alternative course, to tow her to her port of destination for a quarter the sum which the operations of discharging, warehousing and reloading the cargo would entail. In these circumstances the alternative course would be prudently and rightly adopted, and would be called a "substituted expense," and would be apportioned, up to the amount of expense saved, in the same ratio as the expenditure in connection with the more expensive course would have had to have been borne had it been incurred. This, however, in the absence of judicial

authority, has to be a matter of special agreement between the parties; but from an equitable point of view the proposition seems unassailable. As an example, for the sake of clearly elucidating the principle, let us take an imaginary case of a vessel putting into an English port of refuge for repairs in consequence of particular average damage, the adjustment to be governed by British law:—

Suppose that the inward port charges and the cost of discharging the cargo to repair the ship, which would be general average, would amount to, say	£500
The warehouse rent of the cargo during the effecting of repairs to the vessel which, in the circumstances, would form a special charge on the cargo, would amount to, say ..	200
And the cost of reloading the cargo and the outward port charges which, in the circumstances, would be a special charge on freight, would amount to, say	500
The expenditure necessitated at the port of refuge (exclusive of the cost of repairs to the vessel) would consequently be	£1200

But suppose instead of incurring this expense at the port of refuge the vessel could be towed to her port of destination for the sum of only £240, or one-fifth of the expense which would be necessitated by repairing at the port of refuge, and that this cheaper method was rightly and prudently adopted, the £240 must be apportioned in same rates as the greater expense of £1200:—

			Substituted expenses
General average ..	£500	will bear	£100
Cargo (special charge)	200	,, ...	40
Freight ,,	500	,, ...	100
	£1200	Total	£240

In order to justify the incurring of a substituted expense, it is necessary to show (i.) that its adoption has led to a saving of expense, and (ii.) that it was not an expense devolving upon the shipowner by reason of his ordinary obligations under the contract of affreightment.

RAISING FUNDS.

The incurring of expenditure at a port of refuge entails, of course, the providing of the necessary funds to meet it, and if the expenditure be in the nature of general average, the cost of raising, if necessary, and remitting funds to the port of refuge, or bank commission charged for advance of funds at the port against a bill drawn by the master on the owners, are likewise admitted in general average.

One seldom hears, nowadays, of a forced sale of cargo, or even loans on bottomry or respondentia, in order to provide funds, as the cable usually enables such provision to be arranged, but, for completeness, these subjects may be briefly referred to and explained.

FORCED SALE OF CARGO.

With regard to a forced sale of goods in order to raise funds, it should, first of all, be remembered that if the master could have obtained money by any other means, he has no right to resort to sale. Suppose, however, that the goods have been properly and rightly sold at a port of refuge, and realise more than the net value which they would have realised had they been brought on to their destination instead of being sold. In such circumstances, the owner of the goods is entitled to the actual proceeds at the port of refuge. But, conversely, if the goods realise less than they would fetched at destination, then the owner of the goods is entitled to their full net arrived value. He is entitled to any profit and not to suffer any loss. (*Richardson v. Nourse*, 3 B. and Ald. 237). But if, after leaving the port of refuge, and before arriving at destination, the vessel be totally lost, the owner of goods sold at the port of refuge is

not entitled to their market value at destination, as he has lost nothing by their sale. (*Atkinson v. Stephens*, 7 Ex. C. 567).

BOTTOMRY AND RESPONDENTIA.

"Bottomry" is a monetary loan obtained, in cases of urgent necessity, on the security (practically a "pawning") of the ship or ship and cargo jointly; and "respondentia" is a loan similarly obtained on the security of the cargo alone, the sums so advanced being repayable to the lender a certain agreed number of days after arrival of the vessel as specified in the formal document called a "bottomry" or a "respondentia" bond. If the vessel be lost before arrival at destination, the lender loses his money, as it is only payable on condition that the ship and/or cargo arrive. The right to raise money on respondentia is only justified when every other means of obtaining it, except that of selling the cargo, have been exhausted.

LOSSES OR EXPENDITURES NOT ADMISSIBLE IN GENERAL AVERAGE.

Hitherto we have been considering sacrifices and expenses which are properly allowable in general average. But there are certain losses, apparently in the nature of general average, which, nevertheless, according to English law, do not give rise to general average contribution. We will now briefly notice these.

First of all:—*No allowance is to be made if the danger which necessitates the sacrifice or expenditure is attributable to the fault of the person claiming contribution unless he is protected in regard to such fault by the terms of the contract of affreightment.*

Secondly:—*No contribution is due if the loss or expense is one which devolves upon the shipowner by reason of his ordinary obligation under the contract of affreightment, although the loss or expenditure has been enhanced by reason of the danger which threatened the joint adventure.*

Examples of this latter proposition are wages and maintenance of crew at a port of refuge whilst effecting repairs; coals consumed whilst bearing up for a port of refuge; coals used whilst working a donkey-engine to pump a leaky ship; loss by press of sail in keeping off a lee shore or in escaping an enemy, &c.

Thirdly:—*No allowance for loss of cargo is made if the loss is attributable to the fault of the shippers of the cargo.* For instance, if hemp is shipped in a damp state, and heats in consequence (called *vice-propre*), it becomes necessary, therefore, to jettison it; the loss by jettison is, in such circumstances, not allowable in general average. But, of course, the remark would not apply if the heating were in consequence of accidental damage by sea water.

Fourthly:—*No allowance is to be made where no actual loss has been sustained in consequence of the sacrifice.* In other words, if there has been no actual loss sustained, there can have been no sacrifice. The leading case in this connection is that of *Shepherd v. Kottgen* (1877, III. Asp. M.L.C. 544), where a mast was cut away, but the mast, prior to the cutting away, had been reduced to such a condition by perils of the sea that it would inevitably have been lost. It was decided in that case that the cutting away of this mast was not allowable in general average. The mast was already in fact lost, and the cutting away of it, therefore, involved no sacrifice. Other instances in this connection are the shipping of an anchor because it is so fixed to the rocky bottom that it could never be raised; or loss occasioned by water poured upon burning goods if the goods themselves be on fire (*vide p.* 80 *supra*) the goods being in such case really benefited, as the water damage has saved them from total destruction by fire.

Fifthly, and lastly:—*No allowance is to be made if the loss or expense is not a direct consequence of a general average act.* For example, destruction of cargo by fire at a port of refuge after the cargo has been discharged and placed in safety; expenses of warehousing and reloading cargo which has been discharged at

a port of refuge on account of damage which is not the subject of general average (*vide p.* 83 *supra*); or loss of market or interest in consequence of the voyage by reason of a general average act.

TIME AND PLACE OF, AND LAW GOVERNING THE ADJUSTMENT.

Having considered the losses and expenditures which give rise to general average contribution, the next point to be noticed is that the proper time for the adjustment or ascertainment of the contributions due is the termination of the voyage, and the law which governs the adjustment is, in the absence of any stipulation to the contrary in the contract of affreightment, the law of the port of destination. But if the voyage has been broken up at an intermediate port, then the adjustment must be drawn up, subject to any provision to the contrary, in accordance with the law of that port, and on the state of facts as there existing. It may here be mentioned that the shipowner's claim for contribution is capable of enforcement against the cargo, as such, and it is, therefore, customary to require the signature of an Average Bond before delivering up the cargo in order to determine who is to be looked to for payment of the contribution.

PREPARATION OF ADJUSTMENT. LIENS.

It is the duty of the shipowner to arrange for the preparation of the adjustment, and he invariably, and I may say wisely, entrusts this work to a professional Average Adjuster. And the selection of the Adjuster to be employed is a matter which rests entirely with the shipowner. (*Wavertree Sailing Ship Co. v. Love*, 1897, VIII. Asp., M.L.C. 276). It is not necessary, moreover, that the Adjuster should be practising at the port where the adventure terminates. As has just been remarked, the selection of the Adjuster is entirely the affair of the shipowner. The shipowner has a lien on the cargo for the

contributions which are due in respect of general average, *i.e.*, he is entitled to hold the goods until his claim is satisfied. In trifling cases he is usually content if consignees of cargo sign what is called an Average Bond, a document whereby it is agreed that if the shipowner delivers to the consignees their cargo, they will, on their part, pay such amount of general average contribution as may be found due from them, and will furnish him, when required, with full information as to the value of their cargo so that the amount of contribution may be properly assessed. If the general average is of considerable amount, the shipowner, in addition to the Bond, usually enforces his lien by collecting a general average deposit, which should be paid into a bank in the name of two trustees, one appointed by the shipowner and one by the consignees of cargo. But recently some of the leading steamship lines have shown a willingness to accept the guarantee of underwriters for payment of general average contribution instead of insisting on a cash payment by consignees, and there is no doubt that, in course of time, this laudable departure will commend itself for general adoption by shipowners.

CONTRIBUTING INTERESTS AND VALUES.

Having considered the values to be made good in respect of sacrifices, the next question is:—What are the contributing interests, and what value is to be placed upon them for the purposes of assessment of contribution?

The interests which contribute to general average are those which have been saved from destruction on the common adventure by the general average act. They are usually the Ship, the Freight and the Cargo. If, however, the vessel has no cargo on board, and is proceeding in ballast to her loading port under charter, the contributing interests are the vessel and the freight under the charter. For example, suppose a vessel leaving Liverpool in ballast is chartered or hired to go to Savannah to

load a cargo of cotton for conveyance to the United Kingdom, and whilst proceeding to Savannah with no cargo on board a general average sacrifice is made, the contributions to the general average loss are the ship and the chartered freight, or in other words, the amount payable under the charter for the hire of the vessel. *(The "Vestor": Carisbrook S.S. Co. v. London and Provincial Marine Insurance Co. Ltd.*, 1902, VII. Com. Cas. 235*)*. And the judgment in the famous *Brigella* case (1893, VII. Asp. M.L.C. 403) to the effect that if all the contributing interests belonged to the same person there could be no general average contribution has been overruled by the Court of Appeal in the case of the "*Airlie*" *(Montgomery v. Indemnity Mutual Marine Insurance Co.*, 1902, VII. Com. Cas 120).

It may be well here to mention that the personal effects of the master and crew, and the wearing apparel, jewellery and baggage of passengers do not, presumably on the score of general convenience, contribute to general average.

Firstly, then :—The Ship contributes on her value as saved by the sacrifice, *i.e.*, her worth to the owner in the actual condition in which she is on arrival at the port of destination, or, if the voyage is broken up and the ship and cargo part company at an intermediate port, then it must be her value at the intermediate port.

Secondly:—The Freight contributes on the net amount of freight saved by the sacrifice. The contribution applying to freight at risk is paid by the shipowner. Freight paid in advance is ordinarily considered as an increased value of cargo, and the contribution attaching thereto is accordingly included in, and borne by, the owners of cargo.

Thirdly:—The Cargo contributes on its net arrived value at the port of destination, or, if the voyage be broken up, at the port where the ship and cargo part company.

It is a fundamental principle of general average that in the event of there being a sacrifice, the owner of the property sacrificed shall neither benefit nor lose in consequence thereof;

in fact he must be placed in the same position as if, instead of his goods, the goods of somebody else had been sacrificed. To secure this object the cargo sacrificed is, so far as contribution is concerned, regarded as not having been lost, and the value of it which is allowed in general average is, therefore, brought in as a contributory to the general average. For purposes of clearness let us take a simple example.

Suppose cargo of the value of £1,000 is jettisoned, and the value of the property—ship, freight and cargo—which the jettison has saved is £9,000. The amount to be allowed in general average is therefore £1,000. But the contributories to that £1,000 would be not only the £9,000, the value of the property saved, but also the £1,000, the value of the cargo jettisoned and made good by contribution—total values, £10,000 to contribute to a loss of £1,000.

The property saved will therefore pay nine-tenths of the £1,000, or	£900
The value of the property jettisoned and made good in general average will bear one-tenth of the £1,000, or	100
Total.. ..	£1,000

Consequently, the owner of the cargo jettisoned will receive from the other contributories the sum of £900, that being the amount made good in general average, viz., £1,000, less the amount of contribution attaching thereto, viz., £100. If the amount allowed in general average were paid in full without deducting any contribution at all, then the person whose property had been sacrificed would be better off than the person whose property had been saved, because he would recoup his loss in full and escape any contribution. And this would be contrary to the principle that "in result no one is to be better off, nor worse off, than if, instead of his, some other party's property had been given for the sake of all." (Lowndes on General Average, IV. Ed., p. 39).

For purposes of clearness and illustration let us glance at a very simple example of an apportionment of general average expenditure in order to show the principle on which contribution is levied.

Expenditure say £305.

Ship valued at ..	£10,000	pays in	proportion ..		£100
Cargo, net value, ..	20,000	,,	,,	..	200
Freight, net amount,	500	,	,,	..	5
	£30,500				£305

APPLICATION TO INSURANCE.

Having now considered general average, which, as mentioned at the outset, exists independently of marine insurance altogether, let us glance at its application to Insurance.

When a general average sacrifice has been made, the underwriter who has insured the property so sacrificed is directly liable to the assured for the insured value of that property, and, on payment, he is entitled to the amount of compensation allowed in general average, less of course the amount of contribution attaching thereto (as previously explained, p. 93), and even although, as sometimes happens, the amount of the compensation is in excess of the loss which he has paid under the policy. (*Dickenson v. Jardine*, L.R. 3, C.P. 639). And he is likewise directly liable for general average damage, the depreciation being, in the case of Cargo and Freight, assessed on the insured value, in the same manner as if it were particular average damage. In case, however, of a general average loss directly recoverable from underwriters, the assured must give credit for the contributions attaching to any other interests vested in him, and which should contribute to the loss, he being deemed to have such contributions already in his own pocket, whether he be insured in respect of them or not. For example, if the vessel and the cargo both belong to the same person, in claiming

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direct on the underwriter on the vessel for general average sacrifice of ship's materials credit must be given for the cargo's proportion of contribution to such sacrifice. (*The "Airlie": Montgomery v. Indemnity Mutual Marine Insurance Co.*, 1902, VII. Com. Cas. 120).

Let us next deal with the liability of an underwriter in respect of contribution to general average, as opposed to his liability for a general average loss. In ascertaining the amount of liability for contribution, regard must be had to the insured value of the property. If the insured value is equal to, or if it exceeds, the contributing value, then the underwriter pays the whole of the amount of the general average contribution—no more and no less. But if the insured value is less than the contributory value, then the underwriter pays only the proportion of the contribution which the insured value bears to the contributory value, and this principle applies equally to Ship, Freight and Goods.

As an illustration, let us suppose goods with a contributing value of £1,000 have to pay general average contribution amounting to £100. If the insured value be £1,000, or £1,500, the underwriter pays the £100. But if the insured value be £500, then the underwriter is only liable for £50, or one half, this being the proportion which the contributory value, viz., £1,000, bears to the insured value, viz. £500.

As was mentioned on p. 36, general average losses and contributions, and salvage charges are not ordinarily recoverable under the "sue and labour" clause. (*Aitchison v. Lohre*, 1879, IV. Asp., M.L.C. 168).

CHAPTER VIII.

SALVAGE.

Salvage is the reward under maritime law to a salvor for saving, or helping to save, property at sea, or property and life conjointly. Sometimes the word is used to designate the property which has been saved. But it is the former meaning which we will now consider—salvage as a reward for saving or succouring property which is in danger at sea. The salvor who has saved property has what is called a possessory lien on it for the reward of his services; and if the property be not actually in his possession, he has a so-called maritime lien, *i.e.*, a claim which he can enforce by legal process in the Court of Admiralty.

It is necessary to notice that salvage is only awarded in case of the saving of a vessel, or part thereof, the lives on board, her cargo and freight. A large floating gas-buoy, for example, was held not to be a vessel, and was therefore not the subject matter of salvage within the jurisdiction of the High Court of Admiralty. (*Gas Float Whitton No.* 2, 1897, VIII. Asp, M.L.C., 272.)

Again, the salvage services must have been of material assistance in salving the vessel. No salvage will be awarded if the attempts of the salvors were of no avail or benefit.

The salvage services must have been rendered by third parties, *i.e.*, persons who are strangers to the adventure. The officers and crew of a vessel cannot claim salvage for helping to save their ship and cargo from danger, as this forms part of their duty as servants to the shipowner.

It does not always happen that the award for salvage services is capable of amicable settlement, or of a special agreement between the salvors and the owners of property salved. And so one finds many cases brought before the Court of Admiralty for decision as to what remuneration is to be paid to

the salvors. After full consideration of all the circumstances in connexion with the salvage services rendered, the Court awards to the salvors the remuneration to which it considers they are entitled, this being called a Salvage Award.

Salvage payable under a salvage award is usually dealt with in the same manner as general average expenditure, and it is apportioned over the values of the interests saved. And in recovering from underwriters, where the insured value is less than the contributory value, the amount recoverable is reduced in proportion, in exactly the same manner as in dealing with general average contribution. Any difference of opinion on this point has been finally set at rest by the decision in the case of *Balmoral Steamship Co. v. Marten* (1902, VII., Com. Cas., 292), in which the House of Lords laid down the principle just mentioned. In that case a vessel was valued in the policy at, and was insured for, £33,000. Salvage services were rendered to her, and a salvage award was made by the Admiralty Court, the amount being based on a valuation of £40,000. It was decided that the underwriters were only liable for $\frac{33}{40}$ths of the amount so awarded.

If, however, the salvage services have been occasioned in consequence of unseaworthiness of the vessel, the underwriter is not liable for any portion of the remuneration awarded to the salvors by the Court of Admiralty. For example, a vessel, insured under a "time" policy, put to sea with an insufficient coal supply, and in consequence had to obtain assistance in respect of which the salvors recovered a salvage award from the Admiralty Court. In an action by the shipowners against the underwriter to recover the salvage so awarded, it was held by the Court of Appeal that the salvage charges were not rendered necessary by a peril of the sea, but, by the inherent unfitness of the steamer, and that therefore the underwriters were not liable. (*Ballantyne & Co. v. Mackinnon*, 1896, I. Com. Cas., 424.)

CHAPTER IX.

SUBROGATION.

Subrogation is the right by which an underwriter, on his settling a loss, is enabled to place himself in the position of the assured, to the extent of acquiring all rights and remedies in respect of the said loss which the assured may have possessed, either in the nature of proceedings for compensation or recovery in the name of the assured against third parties, or in obtaining general average contribution for the loss.

The following are the provisions of the Marine Insurance Bill in this connection :—

> § 80. i. When the insurer pays for a total loss, either of the whole, or in the case of goods, of any apportionable part of the subject-matter insured, he thereupon becomes entitled to whatever may remain of the subject-matter so paid for, and he is thereby subrogated to all the rights and remedies of the assured in, and in respect of, that subject-matter as from the time of the casualty causing the loss.
>
> ii. Subject to the foregoing provisions, when the insurer pays for a partial loss, he acquires no title to the subject-matter insured, or such part of it as may remain, but he is thereupon subrogated to all rights and remedies of the assured in and in respect of the subject-matter insured as from the time of the casualty causing the loss, in so far as the assured has been indemnified, according to this act, by such payment for the loss.

Let me for clearness give some examples of subrogation :—

Suppose a ship is missing and the underwriter pays a total loss in consequence. If the vessel should subsequently arrive,

she then belongs to the underwriter. (*Houstman v. Thornton*, 1816, Holt, N.P.. 242.)

Or, suppose goods are jettisoned for the general safety. The underwriter, on paying for a total loss of the jettisoned goods, stands in the place of the assured, and is entitled to the general average compensation for the jettison. (*Dickenson v. Jardine*, 1868, L.R. 3, C.P. 639.)

To put another example: Suppose a vessel valued at £6,000 was insured for £6,000, but her real value was £9,000. Owing to a collision she was sunk, and the underwriters paid a total loss of £6,000. In due course, the assured recovered from the wrong-doing vessel a sum of about £5,700. The assured contended that they were entitled to retain one-third of this sum (the vessel's actual value being £9,000, and the insured value being £6,000), but it was decided that the underwriters were entitled to retain the whole of this £5,700, £6,000 being the value admitted in the policy. (*North of England Insurance Association v. Armstrong*, L.R. 5, Q.B., 244).

It must always be remembered that the rights and remedies to which the underwriter is subrogated are only those which the assured himself would be able to exercise. As an instance of this, let us suppose two ships, belonging to one and the same owner, come into collision. The underwriter of the ship not in fault, on paying for the damage occasioned to the vessel insured under his policy, has no claim against the wrong-doing vessel, on the ground that a person cannot sue himself (as was decided in the case of *Simpson v. Thompson*, 1877, III. Asp., M.L.C. 567), and consequently, as both vessels were owned by one and the same person no remedy had been transferred to the underwriter.

CHAPTER X.

EXPRESSED WARRANTIES.

An expressed warranty, contrasted with an implied warranty, is a condition of the contract which is expressed and set forth in the policy, and a strict compliance with any warranty so expressed is absolutely essential; otherwise the contract is invalid. And it does not avail the assured if in a given case the particular breach has had no relation whatever to a loss which has occurred; this is beside the question.

WARRANTY "TO SAIL."

One of the expressed warranties most constantly met with is a warranty to the effect that a vessel shall sail on or before a certain date. A question may then arise as to what constitutes a sailing within the meaning of such a warranty. It is not necessary in order to satisfy the warranty that the vessel shall have actually quitted her port of departure. It will be sufficient if the vessel has set out on her voyage with everything ready for its prosecution and able to leave port if not prevented by some accident. But if anything is wanting in order to enable her to proceed on her voyage, such as a full complement of crew, or a clearance at the custom house, and it is necessary in consequence to stop for these, the mere "breaking of ground" will not satisfy the warranty. The test is whether there was a clear intention on the part of the master when the vessel left her moorings to proceed directly on the voyage. The motive of moving the vessel from her moorings must be looked to, and that motive supplies the test whether or not the warranty has been complied with. (*Sea Insurance Co. v. Blogg*, 1898, III. Com. Cas. 218).

A warranty "to sail *from*" a specified port on a certain date will not have been complied with unless the vessel has actually left the precincts of the port named. This warranty is absolute. If the ship is ready to leave port and is prevented by bad weather or accident, this is beside the question. If she has not quitted the port by the date specified, the policy is void for breach of warranty.

"WARRANTED NO IRON OR ORE."

Another warranty in common use is:—

"Warranted no iron or ore in excess of registered tonnage." With regard to this warranty, the Court of Appeal have held that the word "iron" includes "steel," and that the shipping of a quantity of "steel" in excess of the net registered tonnage of the vessel avoided the policy. (*Hart v. Standard Marine Insurance Co.*, 1889, VI. Asp., M.L.C. 368.)

This decision shows that a warranty binds the assured not merely to a verbal fulfilment, but to the full commercial import of the words used therein.

WARRANTED PART VALUE UNINSURED.

Another warranty frequently met with in insurances on hulls of vessels is a warranty that a certain sum, or so much per cent., of the insured value shall be uninsured, *i.e.*, that the owner shall, in effect, be his own underwriter for the specified sum or percentage. And in some instances the willingness of a shipowner to run part of the risk himself is an element not unfavourably regarded by the underwriters, as the shipowner has to keep his own pocket in view as regards careful navigation, and in the event of claims occurring under the policy; and, as he would have to bear his proportion of any loss, it would also be to his interest to employ only competent officers and crew, and to keep down expenses as far as possible in case of repairs.

An interesting decision in connection with the warranty we are now considering arose in the case of the *General Insurance*

Co., of Trieste, v. Cory (1897, II. Com. Cas. 58). In that case a shipowner valued his vessel for insurance at £12,000 and insured her for £9,600, warranting that in respect of the remaining £2,400 he would remain uninsured, or, in other words, be his own underwriter. He subsequently heard rumours that some of the underwriters on the £9,600 were likely to become insolvent, so, like a prudent man, he effected further insurances to cover the probable deficiency which might arise in the event of loss in consequence of some of the original underwriters being unable to pay. Mr. Justice Mathew held that, in such circumstances, the effecting of the further insurances by the shipowner was not a breach of the warranty.

There are in the matter of "expressed" warranties other warranties of endless variety, both as regards stipulations and wording, but space will not permit my touching on them in the course of this handbook.

The "Memorandum" and the "free of capture and seizure" clause, are, of course, two of the best-known express warranties, but these have already been explained (*vide pp.* 39 and 67 *supra*).

It must be again repeated, however, that the terms of all "expressed" warranties must be strictly and accurately complied with equally with the implied warranties. The latter have been dealt with in Chapter I. (*vide p.* 4 *et seq. supra*).

CHAPTER XI.

SUNDRY CLAUSES IN GENERAL USE.

With regard to clauses which are attached to policies of marine insurance for the purpose of giving effect to the exact intention of the parties, their variety is almost boundless. Some idea of their number can be formed from the fact that some years ago, Mr. Douglas Owen undertook the labour of collecting and classifying them, and published them in the form of a book of some 275 pages. It is proposed, however, only to deal with those familiar clauses which are in common daily use in the marine insurance world.

"F.P.A." CLAUSE.

A clause used every day, almost every hour, is what is known as the f.p.a. (*i.e.* free of particular average) clause, which is in effect an amplification or extended application of the Memorandum.

It reads as follows, viz. :—

> "*Warranted free from particular average unless the vessel or craft be stranded, sunk, or burnt, each draft or lighter being deemed a separate insurance. Underwriters, notwithstanding this warranty, to pay for any damage or loss caused by collision with any other ship or craft, and any special charges for warehouse rent, re-shipping, or forwarding, for which they would otherwise be liable. Also to pay the insured value of any package or packages which may be totally lost in transhipment.*"

It really amounts to a *warranty*, and I was rather in doubt whether it ought not to have dealt with it under the head of "expressed warranties," but I came to the conclusion that though it, like many other clauses, is technically a warranty, it would be more appropriately treated of as a clause.

By the terms of this clause, which is used in connection with insurances on goods, the interest is warranted absolutely free from claims for particular average unless the vessel or craft shall have been stranded, sunk, or burnt, or the damage be caused by collision with another ship or craft, or unless any package or packages be totally lost owing to, or during, transhipment from the vessel insured to another vessel, or from the vessel into craft.

We have previously considered (*p.* 72 *et seq. supra*), what constitutes a "stranding," a "sinking," and a "burning," so the meaning of these terms need not be again referred to.

With regard to "stranding" however, it should be borne in mind that in order to entitle the assured to recover a claim for particular average under the "f.p.a." clause (and these remarks likewise refer to the "Memorandum,") it is a condition precedent that at the time when the vessel strands the goods shall have been actually on board. This has been decided in two important and interesting cases to which it is proposed now briefly to refer:

The first case was that of *The Thames & Mersey Marine Insurance Company v. Pitts, Son & King* (1893, VII., Asp. M.L.C. 302). A cargo of River Plate Maize was insured from San Nicolas, and from Buenos Ayres, to a port in Europe, 26,910 bags from San Nicolas, and 8,299 from Buenos Ayres. The policy covered the risk of craft, but was warranted free from particular average (like corn), unless the ship or craft be stranded. The San Nicholas maize was loaded on board, and the vessel then proceeded down the river Parana towards Buenos Ayres to load the 8,299 bags, which were awaiting her arrival there in lighter. Whilst on her way down the river she stranded. She was got off, arrived at Buenos Ayres, was found after survey, to be seaworthy, and she thereupon loaded the Buenos Ayres maize. During the voyage thence to Europe a large portion of the cargo was damaged by sea water, and the assured sought to recover their loss on the Buenos Ayres maize (shipped as will be remembered *after* the stranding) from their underwriters, alleging that inasmuch as the insurance was warranted free from particular

average unless the vessel be stranded, and that as, in fact, the vessel had been stranded, they were entitled to be paid their claim. But the Court held that the assured were not entitled to recover on the Buenos Ayres parcel, for the reason that it was not at risk in the vessel when she stranded, and that therefore the warranty had not been done away with so far as that portion of the maize was concerned.

The second case was that of the "*Alsace and Lorraine*" (*Blackwood Bryson & Co. v. British & Foreign Marine Insurance Company*, 1893, VII. Asp. M.L.C., p. 362). The insurance was on rice from Calcutta to ports in the West Indies "Warranted free from particular average unless the ship be stranded." On the voyage the vessel met with violent weather, and subsequently the master put into Mauritius in order to repair the vessel. The cargo was there discharged, some of it being so badly damaged as to necessitate its condemnation and sale. Whilst the cargo was discharged and during the progress of the repairs, the vessel was, during a gale, stranded on a coral reef and was subsequently lost. At the time of this accident there was, of course, no cargo on board, but it was the intention, after repairs had been effected, to reload the cargo for conveyance to destination. The rice which was fit for reshipment was eventually forwarded to its destination by a vessel called the "Brazil." Unfortunately the "Brazil" also met with heavy weather which resulted in damage by sea water to the rice on board. The assured claimed upon the underwriters for the particular average damage to the rice on the ground that the vessel on which the rice was originally loaded had been stranded. But Mr. Justice Barnes held that the underwriters were not liable inasmuch as the interest was not on board the vessel at the time of the stranding, and the fact that it was contemplated, up to the time of the stranding, that the rice should be reloaded on the "Alsace and Lorraine," did not affect the position.

But if the vessel or craft strands whilst the cargo is actually on board, then the underwriter is liable for the whole particular

average, although the damage may have arisen entirely independently of the stranding (*vide p. 72 supra*).

The clause further provides that each craft or lighter shall "be deemed a separate insurance," so that in the event of a lighter stranding, the underwriter would be liable for any particular average damage to the goods, and only to those goods, which were on board the lighter at the time of the stranding.

Let us now glance for a moment at the following words which appear in the clause we are considering :—

> "*Underwriters, notwithstanding this warranty to pay . . . . any special charges for warehouse rent, re-shipping, or forwarding, for which they would otherwise be liable.*"

It has already been pointed out (*vide p.* 68 *supra*) that special charges, in order to be recoverable from underwriters, must have been incurred to avert or minimise a loss for which the underwriters were liable under their policy. Consequently, if special charges were incurred on account of partial loss or damage, and the goods have been insured "warranted free from particular average," such charges would not be recoverable in the absence of special provision in the policy to the contrary. For instance, in the case of *Great Indian Peninsular Railway Co. v. Saunders* (1861, 2 B. & S., 266), a shipment of railway iron was insured from London to Bombay, "warranted free from particular average." The ship was disabled, and was towed to Plymouth seriously damaged, and was there condemned. The rails were discharged and shipped to London, where they were transhipped and forwarded to their original destination at an increased freight. The cost in connexion therewith amounted to some £825, and the owners of the rails sought to recover this amount under the policy. But the Court held that the underwriter was not liable, as the charges were not incurred to avert a total loss of the rails.

So, by the special stipulation in the "f.p.a." clause above referred to, the underwriter agrees, as an act of grace, to pay

special charges for warehouse rent, reshipping, or forwarding, for which he would be liable except for the "f.p.a." warranty.

GROUNDING IN SUEZ CANAL, ETC.

"*Grounding in the Suez Canal . . . . . not to be deemed a strand, but underwriters to pay any damage or loss which may be proved to have directly resulted therefrom.*"

In view of the fact that taking the ground in the Suez Canal and certain other such places is of so common occurrence, this clause was introduced. If the vessel so strands, or rather "grounds," the underwriter on cargo specially agrees to pay any damage or loss directly resulting to the cargo from the grounding, but otherwise the terms of the free of particular average warranty and/or Memorandum remain unaffected. The grounding is, in fact, not to be regarded as technically a stranding, but, as a sort of compromise, the underwriters agree to pay any damage actually caused by the grounding.

FOREIGN GENERAL AVERAGE CLAUSE.

"*General average and salvage charges payable as per official foreign adjustment if so made up, or per York-Antwerp Rules, if in accordance with the contract of affreightment.*"

When dealing with general average it was mentioned that, in the absence of any stipulation to the contrary in the contract of affreightment, the law which must govern its adjustment is the law of the port—*i.e*, of the country—of destination, or of the place where the ship and cargo part company if the voyage be broken up. And as the laws of various countries respecting general average differ materially, not only from our own law, but also as between themselves, it can be readily understood that the liability for contribution would equally vary according to the port to which the vessel might be destined. And in order that there should be no doubt as to the liability of the underwriter to pay general average in accordance with foreign law, the first portion of the clause came into general use. If the general average has been properly and correctly adjusted according to the foreign law of the port

of destination, or of the place where the ship and cargo part company, if the voyage be broken up, the underwriter is bound to pay under the statement.

Further, the underwriter agrees not only to pay general average according to foreign statement, but also to the York-Antwerp Rules, if in accordance with the contract of affreightment.

As to the origin and development of the York-Antwerp Rules, the subject does not come within the province of this handbook. Suffice it is to say for present purposes, that they are a code of rules relating to general average agreed upon by English and Foreign jurists, adjusters, shipowners, merchants and underwriters, as the result of meetings held first in York and subsequently at Antwerp (and at Liverpool in 1890), the object being not only to form the basis of a uniform system of general average, but also, by embodying a stipulation in contracts of affreightment that these rules shall govern the adjustment of general average, to obviate, on the one hand, the restrictions of British law, and on the other to introduce uniformity in the place of the divergencies which I have already mentioned exist between the laws of various countries. The said Rules are XVIII. in number, and have been arrived at on the basis of compromise—a kind of *via media*, being a give-and-take on the part of both shipowner and cargo owner. Three of the principal results of these rules are:—

(*a*) That no jettison of deckload shall in any circumstances be made good as general average.

(*b*) That no distinction shall be made in the treatment of port of refuge expenses, whether the putting into port be on account of general average sacrifice or on account of particular average damage.

(*c*) That wages and maintenance of crew during extra detention in a port under average shall be allowed as general average.

Although the contract of affreightment may stipulate that general average shall be adjusted according to York-Antwerp

Rules, it would be more correct to say that the adjustment has to be drawn up in accordance with the law of the port—*i.e.*, country—where the voyage terminates or is broken up, subject to the provisions of the York-Antwerp Rules so far as they differ from the law of that country.

Now, when the underwriter agrees by this clause to pay general average according to York-Antwerp Rules, if in accordance with the contract of affreightment, his intention is that the said Rules in their entirety shall control the adjustment. Consequently it was thought that if the contract of affreightment contained reference not to the Rules in their entirety, but to a mutilated form of them, such, for example, as a stipulation that general average should be adjusted "according to York-Antwerp Rules, excluding Rule I," or, in effect, that if deck cargo be jettisoned it shall be made good in general average, in such circumstances no effect whatever should be given to the York-Antwerp Rules in ascertaining the liability of the underwriter. In other words, either all the York-Antwerp Rules should apply, or else none, so far as the underwriter is concerned. But a curious and interesting point in this connection arose in the case of *De Hart v. Compañia Anonima "Seguros" Aurora* (1902, VIII. Com. Cas. 42). A steamer was insured under a time policy, containing the provision "general average payable according to foreign statement or per York-Antwerp Rules, if in accordance with the contract of affreightment." Whilst covered by this policy the vessel was chartered to load a cargo of pine-wood at Pensacola for conveyance to Antwerp, the charter-party stipulating that, "In case of average, the same to be settled according to York-Antwerp Rules, 1890, excepting that jettison of deck cargo (and the freight thereon) for the common safety shall be allowable as general average." On sailing from Pensacola, the vessel carried a deck load, which was jettisoned for the common safety during the voyage, and a statement of general average was drawn up at Antwerp. Now, according to Belgian Law, jettison of deck cargo is not allowable as general

average, but Belgian Law likewise recognises as a basis of adjustment any special terms in the contract of affreightment. In the adjustment, the loss by jettison of deck-load was accordingly allowed in general average in consequence of the special stipulation in the charter-party, which rendered inoperative Rule I. of the York-Antwerp Rules. viz. :—

> "No jettison of deck cargo shall be made good as general average."

The defendant underwriters on "ship" declined to contribute to the jettison, arguing that the words in the policy, "according to foreign statement" meant, "according to foreign statement, *i.e.*, without regard to any special contract between the parties to the contract of affreightment." But Mr. Justice Kennedy decided against them on the ground that in the circumstances the statement must be regarded as a "foreign" statement, because it was correctly made up according to the law of Belgium, which provided that regard must also be had to any special terms in the contract of affreightment, and that consequently they were liable, inasmuch as they had agreed to pay "according to foreign statement." It is understood, however, that this judgment is under appeal.

RUNNING-DOWN CLAUSE.

In the year 1836 it was decided, in the case of *De Vaux v. Salvador*, (4A. & E., 420), that the amount which a shipowner had had to pay for damages caused to another vessel by collision was not recoverable from an underwriter under the ordinary wording of the marine policy covering loss of, or damage to, the ship insured. This decision led to the introduction, by means of a clause, of a separate contract, over and above the contract of insurance itself, whereby the underwriter agrees to take upon himself the risk of liability of the owner for damage done by the vessel insured owing to collision with another vessel. The clause embodying this separate contract is called, the "Running-Down Clause," or, sometimes the "Collision Clause."

The clause now in general use is as follows, viz. :—

> "*And it is further agreed that if the ship hereby insured shall come into collision with any other ship or vessel, and the assured shall in consequence thereof become liable to pay, and shall pay by way of damages to any other person or persons any sum or sums not exceeding in respect of any one such collision the value of the ship insured, this company will pay the assured such proportion of three-fourths of such sum or sums so paid as its subscription bears to the value of the ship hereby insured.*"

The word "company" appears in the clause above quoted, because it is the form affixed to policies of the companies—otherwise the word "underwriter" would appear.

So then, in the first part of the contract the underwriter agrees to pay up to the amount of his policy, three-fourths of any sum which the owner of the ship insured may have to pay, and shall pay, to the owner of another vessel for damage caused by collision. Sometimes—though this is exceptional—the underwriter may specially agree to pay his proportion of the whole (not three-fourths only) of such liability. in which case the clause would be worded accordingly.

With regard to the term "collision," it does not follow that the underwriter's liability is limited to the damages which an owner may have to pay in consequence of the collision immediately between his own vessel and another vessel. It may happen that vessel insured, A, collides with vessel B, and vessel B is then driven against C, doing damage to the latter. In such a case, the underwriter is liable for his proportion of the damages which the owner of vessel A may have to pay in respect of damage to both vessels B and C. Or again, vessel A may collide with vessel B, driving her aground or against a breakwater or wharf, whereby vessel B sustains serious damage. If the owner of vessel A is liable for the damage, the underwriter will be equally liable within the terms of the collison clause, both for the damage actually caused by the collision itself, and for the consequential damage by grounding or fouling the breakwater or wharf.

Further, in order to render an underwriter liable for damages resulting from collision, it is not necessary, as already instanced, that the ship insured should herself have been in actual contact with another vessel. Suppose that the vessel insured A is in tow of a tug B, and tug B collides with another vessel C. If the owner of vessel A is liable to the owner of vessel C for damages caused to her by tug B, then the underwriter on vessel A is liable under the running down clause in his policy for his proportion of A's liability to the owner of vessel C, although the vessels A and C have never been in contact at all. In the eye of the law the tug and the tow are considered as one ship, "the motive power being in the tug, and the governing power in the ship that was being towed." (*McCowan v. Baine*, 1891, VII. Asp., M.L.C. p. 89).

The clause then goes on to read :—

> "*And in cases in which the liability of the ship has been contested, or proceedings have been taken to limit liability, with the consent in writing of this company, the company will also pay a like proportion of three-fourths of the costs which the assured shall thereby incur, or be compelled to pay.*"

Of course, as regards the three-fourths, if the underwriter agrees to pay his proportion of the whole of the costs, the necessary alteration is likewise made in the wording.

In the first place it should be noted that the underwriter agrees to bear his proportion of the costs of litigation, or of limitation of liability (to which we shall next come) on the condition that the costs have been incurred "with his consent in writing."

LIMITATION OF LIABILITY.

By the common law of England (varied, however, as we shall presently see, by a mitigating statute), a shipowner's liability for loss of, or damage to, property, and loss of life or personal injury, is for the full amount of such loss or damage. But in order to encourage the shipping interest, the legislature have from time to time passed certain Acts to limit this responsibility,

the Act at present in force being the Merchant Shipping Act of 1894. This Act provides, *inter alia*, that if, without the actual fault or privity of the owner of a vessel:

(*a*) There is loss of life or personal injury on board that vessel; or

(*b*) There be damage to goods on board that vessel; or, if in consequence of the improper navigation of that vessel.

(*c*) There be loss of life or personal injury, caused to any person on board any other vessel; or

(*d*) There be loss or damage caused to any other vessel, or to any goods, &c., on board any other vessels, the owner of the responsible vessel shall not be liable in damages beyond £15 per ton of the vessel's tonnage if there be loss of life or personal injury, either alone or jointly with property-damage, or £8 per ton of the vessel's tonnage, if the damage be to property only.

If, in case of collision, the owner of the wrong-doing vessel desires to avail himself of the provisions of this Act he must apply to the Court for permission to do so, and when this has been done with the consent in writing of the underwriter, the underwriter agrees to pay his stipulated proportion of the cost of such proceedings, usually called "limitation suit."

The clause goes on:—

"*But when both vessels are to blame, then unless the liability of the owners of one or both of such vessels becomes limited by law, claims under this clause shall be settled on the principle of cross-liabilities as if the owners of each vessel had been compelled to pay to the owners of the other of such vessels such one-half or other proportion of the latter's damages as may have been properly allowed in ascertaining the balance or sum payable by or to the assured in consequence of such collision.*"

First of all, it must be explained, in cases of collision where both vessels are to blame, the primary basis of the settlement is

in effect that each vessel shall bear *one-half* of the damage sustained by the other. For example:—

Vessel A sustains damage	£1000
Vessel B sustains damage	800
B on this *primary* basis would have to pay A half of A's damage, £1,000, or	500
A on this *primary* basis would have to pay B half of B's damage, £800	400

But the Courts have decided that the settlement in such cases is not to be made on the basis of what is termed *cross* liability, *i.e.*, as if there was in fact a liability on the part of the owner of the one vessel toward the owner of the other vessel, and *vice versa*—but it is to be on a basis of a *single* liability—the liability of the *less* damaged vessel for the *difference* between the halves of the respective damages to the two vessels. Thus in the case put, instead of B being deemed liable to A for £500, and A being deemed liable to B for £400: B is to be regarded as liable to A for £100 only, this being the difference between the £500 A's half share of damage and the £400 B's half share of damage—or the same result is arrived at by halving the difference between the greater and the lesser damage, *e.g.*, the difference between A's damage £1,000 and B's damage £800 is £200, one half of which, £100 is the amount of B's liability to A. In such circumstances, as A has had, legally viewed, nothing to pay, he would, in the absence of a stipulation to the contrary, have no claim against his underwriter under the running down clause. In order to avoid such a result, however, underwriters have agreed that settlement of claims shall be on the principle of *cross* liabilities, and this is the reason for the appearance of these words in the clause. In the imaginary figures put by me, under the principle of *cross* liabilities, B would be deemed to have to pay A £500, and A would be deemed to have to pay B £400, and the underwriters on ship A or ship B respectively would pay accordingly.

Then follows the following important provision :—

"*Provided always that this clause shall in no case extend to any sum which the Assured may become liable to pay, or shall pay for removal of obstructions under statutory powers, for injury to harbours, wharves, piers, stages, and similar structures, consequent on such collision, or in respect of the cargo or engagements of the insured vessel, or for loss of life or personal injury.*"

It speaks for itself, and calls for no special comment.

"SISTER SHIP" CLAUSE.

"*Should the vessel hereby insured come into collision with or receive salvage services from another vessel belonging wholly or in part to the same owners, or under the same management, the assured shall have the same rights under this policy as they would have were the other vessel entirely the property of owners not interested in the vessel hereby insured; but in such cases the liability for the collision, or the amount payable for the services rendered, shall be referred to a sole arbitrator to be agreed upon between the underwriters and the assured.*"

The reason for the insertion, or adoption of this clause, is that according to law (*Simpson v. Thompson*, 1877, III. Asp., M.L.C. 567), a person cannot sue himself. This case was referred to when dealing with Subrogation (p. 99 *supra*), and it was this decision which showed the necessity of the clause in question.

CONTINUATION CLAUSE.

"*Should the vessel at the expiration of this policy be at sea, or in distress, or at a port of refuge, or of call, she shall, provided previous notice be given to the underwriters, be held covered at a pro rata monthly premium, to her port of destination.*"

The effect of this very common clause in "time" policies is to place the shipowner, when the ship is at sea on the expiration of the policy, and in consideration of a *pro rata* additional premium, in the same position as if he had insured his vessel for the

particular voyage in the course of which the policy expired, instead of for a portion only of the time occupied in the prosecution of that voyage. You will no doubt remember that, as already mentioned (p. 17 *supra*), a policy for more than 12 months is void by statute. It was the cause of no little stir in the underwriting world when our Courts pronounced (*Charlesworth v. Faber, The "Merrimac,"* 1900, V. Com. Cas. 408: *Royal Exchange Assurance Corporation v. Sjoforsakrings, Aktie-Bolaget Vega,,* 1901, VI. Com. Cas., 189), that "time" policies for twelve months, which had affixed to them the "continuation" clause, carrying them on beyond that period, were void in consequence. It has been recently enacted, however, that no insurance shall be invalid on the ground that, by reason of the "continuation" clause, it may become available for a period exceeding twelve months, provided that a sixpenny stamp be affixed to the policy in addition to the ordinary policy duty in respect of the special agreement contained in the clause which we are now considering; and if, on expiry of the policy, the insurance is extended in accordance with the clause, whether by issue of a new policy or by endorsement on the original policy, such new policy or endorsement must be stamped with the amount of the duty requisite for the voyage or period covered, as if it were a fresh insurance altogether.

RE-INSURANCE CLAUSE.

> "*Being a re-insurance subject to the same clauses and conditions as the original policy or policies, and to pay as may be paid thereon.*"

This clause is used in cases of re-insurance, *i.e.*, where an underwriter who has accepted a risk re-insures the whole or a part of that risk with another underwriter, either because he deems the risk undesirable, or because he has accepted a greater pecuniary responsibility in respect of a particular risk than he thinks it prudent to retain.

With regard to the agreement in this clause, "to pay as may be paid thereon," *i.e.*, on the original policy, there are two conditions which must have been complied with :—

i. The loss which has been paid must have been a loss for which the original underwriter is legally liable, and

ii. It must have been a loss for which the re-insuring underwriter is under the particular terms of the re-insurance policy also liable.

As an illustration which embraces both these conditions, let me instance the case of *Chippendale & others v. Holt* (1895, I. Com. Cas. 197). The plaintiffs re-insured with defendant a hull-risk per the steamer "Ajmir," the re-insurance policy providing that the re-insurance was "subject to the same clauses and conditions as the original policy and to pay as may be paid thereon, but against the risk of total or constructive loss only." In that case it was held that the defendant was only bound to indemnify the plaintiffs against a loss for which the plaintiffs were liable under their policy, and that, consequently, where the plaintiffs had in good faith paid as for a constructive total loss, when as a matter of fact there was no constructive total loss, and consequently no liability for them to settle a constructive total loss, they could not recover the amount so paid from the defendant. The conditions of the re-insurance policy must be strictly complied with, the fact that the original underwriters may have voluntarily or inadvertently paid that which he was not legally obliged to pay, not being a fact affecting the liability of the re-insurer.

TIME PENALTY CLAUSE.

In policies on chartered freights (*i.e.*, as already explained, the amount paid for the hire of a vessel) there is now usually inserted what is called the "time penalty clause," which reads as follows, viz. :—

> "*Warranted free from any claims consequent on loss of time, whether arising from a peril of the sea, or otherwise.*"

The terms of this clause have been strictly construed by our Courts, and the theory of *causa proxima, i.e.*, the proximate cause and not the remote cause must be looked to, has been most rigorously applied. The last case which came before our Courts in connection with this clause was that of *Turnbull, Martin & Co. v. Hull Underwriters' Association* (1900, V., Com. Cas. 248), and it will probably lead to a better understanding of the construction placed upon this clause if a short resumè of that case is given. A steamer was regularly engaged in carrying frozen meat from Australia to London, and engagements for shipments of homeward cargo were booked whilst the steamer was on the voyage out to Australia. The plaintiffs accordingly effected an insurance with defendants "on freight of frozen meat, chartered, or as if chartered, on board, or not on board," the policy containing the clause:—"chartered freights and freights are warranted free from any claim consequent on loss of time whether arising from a peril of the sea or otherwise." Whilst the vessel was at Sydney, about to load, a fire occurred on board, which destroyed the refrigerating machinery. The damage could not without great delay have been repaired at Sydney, and it was therefore impossible for the steamer to carry the frozen meat which had been engaged for her, or any frozen meat at all, on the homeward voyage, and the freight was consequently lost. The plaintiffs sued the defendant underwriters for a total loss of freight under the policy, but it was held that the claim was consequent on loss of time within the meaning of the clause in the policy, or that consequently the underwriters were not liable. "The ship," said Mr. Justice Mathew, "was damaged by a peril insured against; and her capacity to carry frozen meat was suspended until her machinery had been repaired. If she could have been repaired promptly, there would have been no loss of freight. The loss, therefore, was 'consequent on loss of time,' within the meaning of the warranty."

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